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

File No.* SR - 2020 - * 020
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)(2)
- ◎ 19b-4(f)(3)
- ◎ 19b-4(f)(4)
- ◎ 19b-4(f)(5)
- ◎ 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 3241 (Registered Person Being Named a Customer's Beneficiary or Holding a Position of Trust for a Customer)

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 06/23/2020

By Patrice Gliniecki

(Name *)

(Title *)

Senior Vice President and Deputy General Counsel

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.

Patrice Gliniecki,

Required fields are shown with yellow backgrounds and asterisks.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

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

Form 19b-4 Information *

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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 *

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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

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Exhibit Sent As Paper Document

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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

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Exhibit Sent As Paper Document

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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

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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 adopt FINRA Rule 3241 (Registered Person Being Named a Customer's Beneficiary or Holding a Position of Trust for a Customer).

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

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 implementation date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval. The implementation date will be no later than 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

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

Background

Investment professionals, including registered persons of member firms, face potential conflicts of interest when they are named a customer's beneficiary, executor, or trustee or holding a power of attorney or a similar position for or on behalf of their customer. These conflicts of interest can take many forms and can include a registered person benefiting from the use of undue and inappropriate influence over important financial decisions to the detriment of a customer. Moreover, problematic arrangements may not become known to the member firm or customer's other beneficiaries or surviving family members for years. Senior investors who are isolated or suffering from cognitive decline are particularly vulnerable to harm.[2]

Many, but not all, member firms address these conflicts by prohibiting or imposing limitations on their investment professionals, including registered persons, being named as a beneficiary or to a position of trust when there is not a familial relationship.[3] Even where a member firm has policies and procedures, FINRA has observed situations where registered representatives have tried to circumvent firm policies and procedures, such as resigning as a customer's registered representative,

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2 See, e.g., SEC Office of the Investor Advocate, Elder Financial Exploitation White Paper (June 2018) and International Organization of Securities Commissions (IOSCO) Senior Investor Vulnerability Final Report (March 2018) (noting that senior investors are more vulnerable to financial exploitation due to social isolation, cognitive decline and other factors).

3 See Report on the FINRA Securities Helpline for Seniors (December 2015) and Report on FINRA Examination Findings (December 2018) (both discussing member firm policies observed by FINRA staff).

transferring the customer to another registered representative, or having the customer name the registered representative's spouse or child as the customer's beneficiary.[4]

FINRA has taken steps to address misconduct in this area, including:

(1) Identifying effective practices for member firms;[5]

(2) Setting as an examination priority member firms' supervision of accounts where a registered representative is named a beneficiary, executor, or trustee or holds a power of attorney or a similar position for or on behalf of a customer who is not a family member;[6]

(3) Reviewing customer complaints received directly by FINRA and those reported by member firms pursuant to FINRA Rule 4530 (Reporting Requirements) or Form U4 (Uniform Application for Securities Industry Registration or Transfer);

(4) Reviewing regulatory filings made by firms on Form U5 (Uniform Termination Notice for Securities Industry Registration related to terminations for cause) disclosing related issues;

(5) Reviewing matters referred by an arbitrator to FINRA for disciplinary investigation; and

(6) Depending on the facts and circumstances of the conduct at issue, bringing actions for violations of FINRA rules, such as FINRA Rules 2010 (Standards of Commercial Honor and Principles of Trade), 2150 (Improper Use of Customers'

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4 Id.

5 Id.

6 See FINRA 2018 Regulatory and Examination Priorities Letter (January 2018), FINRA 2019 Risk Monitoring and Examination Priorities Letter (January 2019), and FINRA Risk Monitoring and Examination Priorities Letter (January 2020).

Securities or Funds; Prohibition Against Guarantees and Sharing in Accounts), 3240 (Borrowing From or Lending to Customers) or 3270 (Outside Business Activities of Registered Persons).[7]

Proposed Rule Change

To further address potential conflicts of interest that can result in registered persons exploiting or taking advantage of being named beneficiaries or holding positions of trust for personal monetary gain, FINRA proposes adopting new Rule 3241 to create a uniform, national standard to govern registered persons holding positions of trust. This new national standard will better protect investors and provide consistency across member firms' policies and procedures. Proposed Rule 3241 would provide that a registered person must decline:

(1) Being named a beneficiary of a customer's estate[8] or receiving a bequest from a customer's estate upon learning of such status unless the registered person provides written notice upon learning of such status and receives written approval from

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7 See, e.g., Robert Torcivia, Letter of Acceptance, Waiver and Consent, Case ID 2015044686701 (September 26, 2018) (finding, under the facts of the case, that the registered representative violated FINRA Rule 2010 in relation to accepting beneficiary designations and holding powers of attorney for senior customers and failing to inform the member firm of these positions).

8 For purposes of the proposed rule change, a customer's estate would include any cash and securities, real estate, insurance, trusts, annuities, business interests and other assets that the customer owns or has an interest in at the time of death. See proposed Supplementary Material .02 to Rule 3241. The proposed scope is consistent with includable property in a decedent's gross estate for federal tax purposes. See, e.g., IRS FAQs on Estate Taxes, available at https://www.irs.gov/businesses/small-businesses-self-employed/frequently-asked-questions-on-estate-taxes#2.

the member firm prior to being named a beneficiary of a customer's estate or receiving a bequest from a customer's estate; and

(2) Being named as an executor or trustee or holding a power of attorney or similar position for or on behalf of a customer unless:

(a) Upon learning of such status, the registered person provides written notice and receives written approval from the member firm prior to acting in such capacity or receiving any fees, assets or other benefit in relation to acting in such capacity; and

(b) The registered person does not derive financial gain from acting in such capacity other than from fees or other charges that are reasonable and customary for acting in such capacity.[9]

The proposed rule change would not apply where the customer is a member of the registered person's immediate family.[10] The proposed rule change applies to customers who are not immediate family members because of the greater potential risk that the registered person has been named a beneficiary or to a position of trust by virtue of the broker-customer relationship. The proposed rule change also would not affect the

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9 See proposed Rule 3241(a). For example, receipt of a gift from a customer for acting as an executor or trustee or holding a power of attorney or similar position for or on behalf of the customer would be considered deriving financial gain from acting in such capacity.

10 The proposed rule change would define "immediate family" to mean parents, grandparents, mother-in-law or father-in-law, spouse or domestic partner, brother or sister, brother-in-law or sister-in-law, son-in law or daughter-in-law, children, grandchildren, cousin, aunt or uncle, or niece or nephew, and any other person who resides in the same household as the registered person and the registered person financially supports, directly or indirectly, to a material extent. The term includes step and adoptive relationships. See proposed Rule 3241(c).

applicability of other rules (e.g., FINRA Rule 2150 regarding improper use of customer securities or funds). If the proposed rule change is approved, FINRA would assess registered persons' and firms' conduct pursuant to Rule 3241 to determine the effectiveness of the rule in addressing potential conflicts of interest and evaluate whether additional rulemaking or other action is appropriate.

Knowledge

A registered person being named as a beneficiary or to a position of trust without his or her knowledge would not violate the proposed rule change; however, the registered person must act consistent with the proposed rule change upon learning that he or she was named as a beneficiary or to a position of trust. The proposed rule change would apply when the registered person learns of his or her status as a customer's beneficiary or a position of trust for or on behalf of a customer. A registered person may decline being named as a beneficiary or to a position of trust and decline receipt of any assets or other benefit from the customer's estate so as not to violate the proposed rule change. For example, if a customer named her registered person as her beneficiary without the beneficiary's knowledge, the proposed rule change would not apply and the registered person would not be in violation of the proposed rule change. However, when the registered person became aware of being so named (e.g., when the registered person is notified that he or she is to receive a bequest from the customer's estate), the requirements of the proposed rule change would apply and the registered person must act consistent with the proposed rule change (i.e., by declining the bequest unless he or she provides notice to and receives approval from the member firm).

Firm Notice and Approval

To provide flexibility to member firms, the proposed rule change does not prescribe any specific form of written notice and instead would permit a member firm to specify the required form of written notice for its registered persons. Upon receipt of the written notice, the proposed rule change would require the member firm to:

(1) Perform a reasonable assessment of the risks created by the registered person's assuming such status or acting in such capacity, including, but not limited to, an evaluation of whether it will interfere with or otherwise compromise the registered person's responsibilities to the customer;[11] and

(2) Make a reasonable determination of whether to approve the registered person's assuming such status or acting in such capacity, to approve it subject to specific conditions or limitations, or to disapprove it.[12]

If a member firm approves the registered person's assuming such status or acting in such capacity, the member firm has supervisory responsibilities following approval. If the member firm imposes conditions or limitations on its approval, the member firm would be required to reasonably supervise the registered person's compliance with the conditions or limitations.[13] Moreover, where a registered person is knowingly named a beneficiary, executor, or trustee or holds a power of attorney or a similar position for or

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11 In the event that the customer is deceased when the registered person becomes aware that he or she was named the customer's beneficiary, FINRA would expect the member firm's reasonable assessment to include an evaluation of the registered person's relationship with the customer prior to the customer's death (e.g., any red flags of improper conduct by the registered person).

12 See proposed Rule 3241(b).

13 See proposed Rule 3241(b)(3).

on behalf of a customer account at the member firm with which the registered person is associated and the member firm has approved the registered person assuming such status or position, the member firm must supervise the account in accordance with FINRA Rule 3110 (Supervision), including the longstanding obligation to follow-up on "red flags" indicating problematic activity. As to this latter point, with the notification and assessment of a registered person being named as a beneficiary or to a position of trust in relation to a customer account at the member firm, there is inherently more information from which red flags may surface. If a registered person is approved to hold (and receive compensation for) a position of trust for a customer away from the member firm, the requirements of both the proposed rule change and Rule 3270 regarding outside business activities would apply to the activities away from the firm.[14]

The proposed rule change would require a member firm to establish and maintain written procedures to comply with the rule's requirements.[15] The proposed rule change would also require member firms to preserve the written notice and approval for at least three years after the date that the beneficiary status or position of trust has terminated or the bequest received or for at least three years, whichever is earlier, after the registered

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14 There may be arrangements where a registered person holds a position of trust for a customer away from the firm but the requirements of Rule 3270 do not apply because the arrangement is not one of the listed positions in Rule 3270 (i.e., an employee, independent contractor, sole proprietor, officer, director or partner of another person) or the registered person is not compensated, or have the reasonable expectation of compensation, from any other person as a result of any business activity outside the scope of the relationship with his member firm.

15 See proposed Rule 3241(b)(4).

person's association with the firm has terminated.[16] The proposed record retention requirement is similar to the requirement in Rule 3240.

Reasonable Assessment and Determination

FINRA expects that a member firm's reasonable assessment of the risks created by the registered person's assuming such status or acting in such capacity would take into consideration several factors, such as:

(1) Any potential conflicts of interest in the registered person being named a beneficiary or holding the position of trust;

(2) The length and type of relationship between the customer and registered person;

(3) The customer's age;

(4) The size of any bequest relative to the size of a customer's estate;

(5) Whether the registered representative has received other bequests or been named a beneficiary on other customer accounts.

(6) Whether, based on the facts and circumstances observed in the member's business relationship with the customer, the customer has a mental or physical impairment that renders the customer unable to protect his or her own interests;

(7) Any indicia of improper activity or conduct with respect to the customer or the customer's account (e.g., excessive trading); and

(8) Any indicia of customer vulnerability or undue influence of the registered person over the customer.

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16 See proposed Supplementary Material .03 to Rule 3241.

This list is not intended to be an exhaustive list of factors that a member firm may consider as part of its assessment. Moreover, while a listed factor may not be applicable to a particular situation, the factors that a member firm considers should allow for a reasonable assessment of the associated risks so that the member firm can make a reasonable determination of whether to approve the registered person assuming a status or acting in a capacity.

For example, a registered person's request to hold a position of trust for an elderly customer who had no relationship with the representative prior to the initiation of the broker-customer relationship is likely to present different risks than a registered person's request to hold a position of trust for a longstanding friend. FINRA would not expect a registered person's assertion that a customer has no viable alternative person to be named a beneficiary or to serve in a position of trust to be dispositive in the member firm's assessment.

The proposed rule change would not prohibit a registered person being named a beneficiary of or receiving a bequest from a customer's estate. However, given the potential conflicts of interest, under the proposed rule change a member firm would need to carefully assess a registered person's request to be named a beneficiary of or receive a bequest from a customer's estate, and reasonably determine that the registered person assuming such status does not present a risk of financial exploitation (e.g., a registered person receiving a bequest from a customer who has been a godparent since childhood or a customer who has been a friend since childhood) that the proposed rule is designed to address.

If possible, as part of the reasonable assessment of the risks, FINRA would expect a member firm to discuss the potential beneficiary status or position of trust with the customer as part of its reasonable determination of whether to approve the registered person assuming the status or acting in the capacity.

Scope of Proposed Rule

To address attempted circumvention of the restrictions (e.g., by closing or transferring a customer's account), the proposed rule change would define "customer" to include any customer that has, or in the previous six months had, a securities account assigned to the registered person at any member firm.[17] Member firms have flexibility to reasonably design their supervisory systems to achieve compliance with the proposed rule change (e.g., by using training, certifications or other measures). In addition, as discussed below, the proposed rule change would require the registered person, within 30 calendar days of becoming so associated, to provide notice to and receive approval from the member consistent with the rule to maintain the beneficiary status or position of trust.[18]

A registered person who does not have customer accounts assigned to him or her would not be subject to the proposed rule change. In addition, a registered person

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17 See proposed Supplementary Material .01 to Rule 3241. A securities account would include, for example, a brokerage account, mutual fund account or variable insurance product account. For purposes of the proposed rule change, therefore, a registered person who is listed as the broker of record on a customer's account application for an account held directly at a mutual fund or variable insurance product issuer would be subject to the proposed rule's obligations (this is sometimes referred to as "check and application," "application way," or "direct application" business).

18 See proposed Supplementary Material .04 to Rule 3241.

instructing or asking a customer to name another person to be a beneficiary of the customer's estate or to receive a bequest from the customer's estate would present similar conflict of interest concerns as the registered person being so named. Accordingly, the proposed rule change would not allow a registered person to instruct or ask a customer to name another person, such as the registered person's spouse or child, to be a beneficiary of the customer's estate or to receive a bequest from the customer's estate.[19]

Beneficiary Status and Positions of Trust Prior to Association with Member Firm

Registered persons move with some frequency between member firms. If a registered person was named as a beneficiary or to a position of trust prior to the registered person's association with the member firm, the proposed rule change would require the registered person, within 30 calendar days of becoming so associated, to provide notice to and receive approval from the member consistent with the rule to maintain the beneficiary status or position of trust.[20]

Pre-Existing Beneficiary Status and Positions of Trust

Potential conflicts of interest also exist when the beneficiary status or position of trust was entered into prior to the existence of a broker-customer relationship, such as where the customer was not a customer of the registered person at the time at which the registered person was named beneficiary or to a position of trust. These situations also have the potential that investment and other financial decisions will benefit the registered person as the customer's beneficiary or holder of a position of trust rather than the customer. Therefore, the proposed rule change would require the registered person and

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19 See proposed Supplementary Material .06 to Rule 3241.

20 See proposed Supplementary Material .04 to Rule 3241.

member firm to act consistent with the rule for any existing beneficiary status or position of trust prior to the initiation of the broker-customer relationship.[21]

As noted in Item 2 supra, if the Commission approves the proposed rule change, FINRA will announce the implementation date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval. The implementation date will be no later than 180 days following publication of the Regulatory Notice announcing Commission approval.

(b) Statutory Basis

The proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[22] 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.

FINRA believes that the proposed rule change would result in minimal costs to member firms, while providing additional investor protections where such policies do not currently exist, are not consistently applied or are less restrictive than the proposed changes. The proposed rule change will ultimately benefit the investor community, and promote greater trust in the brokerage industry, by reducing the potential exploitation of vulnerable investors. FINRA believes that establishing an industry-wide benchmark for

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21 See proposed Supplementary Material .05 to Rule 3241. The proposed rule change would apply if the registered person is named a beneficiary or receives a bequest from a customer's estate after the effective date of the rule. For the non-beneficiary positions, the proposed rule change would apply to positions that the registered person was named to prior to the rule becoming effective only if the initiation of the broker-customer relationship was after the effective date of the proposed rule.

22 15 U.S.C. 78o-3(b)(6).

situations in which registered persons request member firm approval to be named beneficiaries or to positions of trust mitigate potential conflicts of interest consistently across the industry for all customers.

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

FINRA does not believe that the proposed rule change would 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 rule change.

Economic Impact Assessment

FINRA has undertaken an economic impact assessment, as set forth below, to further analyze the regulatory need for the proposed rule change, its potential economic impacts, including anticipated costs, benefits, and distributional and competitive effects, relative to the current baseline, and the alternatives FINRA considered in assessing how best to meet its regulatory objective.

Regulatory Need

FINRA is active in its efforts to protect senior and financially vulnerable investors from exploitation. In the context of these efforts, and with evidence of a growing trend of such exploitation, FINRA has recognized the potential conflict of interests that can arise from having a customer name their registered representative as a beneficiary or to a position of trust. To mitigate such conflicts of interest, as well as any potential resulting harm, FINRA is proposing adoption of Rule 3241.

Economic Baseline

The economic baseline for the proposed rule change is based on the existing firm policies and practices on beneficiary status and positions of trust, as well as the

prevalence of registered persons being named in such capacity. To gauge the extent of both, FINRA has sought information with regard to current practices from a sample of member firms and trade associations. Specifically, FINRA sought information on current practices from firms represented on FINRA advisory committees and engaged trade associations in conversations. Information obtained indicates that the majority of firms have existing policies in place with respect to registered persons being named beneficiaries or to positions of trust.

The majority of member firms that participated in FINRA's outreach efforts indicated that they currently do not permit a registered person to be named a beneficiary for a customer who is not a family member, with some variations on how family relationship is defined. Firms indicated that they are more likely to allow registered persons to be named to positions of trust, in compliance with the firm's internal processes and procedures. Registered persons are typically required to request approval from the member firm to be named as a beneficiary or to a position of trust. Approval is usually requested through the outside business activities submission process. Monitoring of compliance with the procedures is conducted through the member firms' various control functions including, for example, branch exams, annual questionnaire responses, and supervisory review of emails. FINRA understands, based on anecdotal information collected through its outreach efforts, that over the past five years more than 85% of such requests by registered persons have been on behalf of immediate family members.

Economic Impacts

FINRA believes that the economic impacts of the proposed rule change would result in minimal costs to member firms, while benefiting the investor community by

providing additional investor protections where such policies do not currently exist, are not consistently applied or are less restrictive than the proposed changes.

The proposed rule change will ultimately benefit the investor community, and promote greater trust in the brokerage industry, by potentially reducing the exploitation of vulnerable investors. FINRA believes that establishing an industry-wide benchmark for situations in which registered persons request to be named beneficiaries or to positions of trust mitigate potential conflicts of interest consistently across the industry for all customers. As described above, such conflicts of interest can include, but are not limited to, a registered person benefiting from the use of undue and inappropriate influence over important financial decisions to the detriment of a customer.

Anecdotal information provided to FINRA indicates that most member firms that participated in the outreach efforts have in place both specific policies and procedures to manage requests for registered persons to act in a position of trust, as well as mechanisms to monitor compliance. FINRA believes that where member firms already have these types of policies and procedures in place, the costs of the proposed rule change should be low, mostly stemming from compliance requirements. For example, FINRA observed some variation in firm policies regarding whether a registered person may be named a customer's beneficiary after transferring the customer account to another registered person. As this specific issue could result in circumvention of the regulatory intent of the proposed rule, FINRA is proposing to include a six-month look-back period with respect to the customer-registered person relationships. FINRA believes that this will provide

some guardrails against attempts to circumvent the proposed rule, while imposing minimal costs on firms with respect to monitoring of transfers of accounts.

Member firms with different policies and procedures, whether more or less restrictive than proposed here, would likely incur costs to amend them. Those firms required to establish a higher standard for these activities may also incur new on-going supervisory costs. The same would be true for those member firms with no current policies or procedures covering these situations. Member firms with existing practices that are more restrictive than the proposed rule change could maintain those policies. However, member firms altering their current policies and procedures to be in alignment with the proposed rule change are expected to incur one-time costs to do so. Member firms will also incur some costs to provide training on the new requirements for registered persons.

FINRA recognizes that the proposed rule change can result in a diminishing of customer choice in identifying a person to serve in a capacity of trust. There may be circumstances where the registered person represents a better alternative to the customer than other available options. There may also be costs to a customer to amend estate or other legal documents if the member firm disapproves a registered person being named a beneficiary, executor, or trustee or holding a power of attorney or a similar position for or on behalf of the customer. Despite the potential loss of an appropriate person to serve in a capacity of trust or potential costs to a customer to amend estate or other legal

documents, FINRA believes that this cost is justified by the protections afforded to investors by significantly mitigating the particular conflict of interest.

FINRA recognizes that investment advisers, as well as other financial services professionals under different regulatory oversight, potentially have similar conflicts of interest with their customers when engaged in these activities.[23] This is the case because the conflict of interest is not unique to the brokerage industry. Rather, the conflict arises from the pecuniary benefits that may accrue because of the nature of the relationship between the customer and the financial professional. However, there is no available information or data to permit FINRA to gauge the prevalence and impact of such relationships between these other financial professionals and their customers. Further, it is difficult to gauge the circumstances under which differences in the regulatory treatment of this activity would impact competition.

Alternatives Considered

FINRA considered various alternatives to the provisions in the proposed rule change. One alternative considered was prohibiting a registered person from inducing a customer to name the registered person as a beneficiary of the customer's estate. FINRA believes that the proposed rule change is a better approach for addressing potential conflicts of interest because of the inherent difficulty in proving inducement. Second, FINRA considered an outright prohibition of some or all positions of trust, but decided against that approach as some positions of trust, if properly known to and supervised by member firms, may benefit customers. Third, FINRA understands that member firms

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23 An investment adviser or investment adviser representative is subject to Section 206 of the Investment Advisers Act of 1940 and the rules thereunder regarding prohibited transactions. 15 U.S.C. § 80b–6.

may have different approaches to defining family members in their current policies. FINRA considered different definitions of the term "immediate family," and ultimately based the definition in the proposed rule change on the definition in Rule 3240 with some changes to modernize the scope of covered persons and to incorporate the requirement that the other person reside in the same household as the registered person.[24] FINRA believes that this approach is appropriate given that member firms have the discretion to review and approve arrangements with customers who are not "immediate family" as defined in the proposed rule change, but may be considered family members in member firms' current policies.

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 19-36 (November 2019) ("Notice 19-36 Proposal"). FINRA received 17 comment letters in response to the Notice 19-36 Proposal. A copy of the Notice 19-36 Proposal is attached as Exhibit 2a. Copies of the comment letters received in response to the Notice 19-36 Proposal are attached as Exhibit 2c.[25]

The comments and FINRA's responses are set forth in detail below.

Support for the Notice 19-36 Proposal

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[24] The definition of "immediate family" in other FINRA rules includes persons who reside in or are members of the same household. See, e.g., FINRA Rule 5110(a)(13) (Corporate Financing Rule—Underwriting Terms and Arrangements).

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

Six commenters expressed support for the Notice 19-36 Proposal.[26] For example, ASA supported the proposed approach and stated that for most member firms, the Notice 19-36 Proposal would not fundamentally alter current practices or significantly increase the costs of compliance but would help crack down on those instances where unscrupulous actors within the industry try to exploit existing loopholes within the regulatory framework. FSI stated that the Notice 19-36 Proposal establishes clear parameters for member firms and financial professional to follow and appropriately allows member firms the flexibility to tailor the process to their unique business model.

While supporting the Notice 19-36 Proposal, the St. John's Clinic suggested also requiring member firms to disclose more information about a broker's employment status and reason for termination than would otherwise be available on BrokerCheck as a registered person may obtain a position of trust shortly after being terminated by a member firm. Mack also supported the Notice 19-36 Proposal and suggested requiring additional supervision and a surprise audit requirement when a registered person has been approved to hold a position of trust for a customer. Requirements related to disclosing more information about a registered person's employment status and reasons for termination than would otherwise be available on BrokerCheck are beyond the scope of the proposed rule change. If the proposed rule change is approved, FINRA would assess registered persons' and firms' conduct pursuant to the rule to determine the effectiveness of the rule in addressing potential conflicts of interest and evaluate whether additional rulemaking or other action is appropriate

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26 See ASA, FSI, Mack, PIABA, SIFMA and St. John's Clinic.

Four additional commenters expressed support for some aspects of the Notice 19-36 Proposal but suggested material changes to the Notice 19-36 Proposal.[27] Bolton supported the Notice 19-36 Proposal's addressing a registered person being named a customer's beneficiary, but suggested that holding positions of trust could be addressed under the outside business activity framework in existing FINRA rules.

The proposed rule change's requirement that a registered person provide notice to and receive approval from the member with which he or she is associated is similar to the requirements for notice and approval of outside business activities in Rule 3270. Pursuant to Rule 3270, no registered person may be an employee, independent contractor, sole proprietor, officer, director or partner of another person, or be compensated from any other person as a result of any business activity away from the member firm, unless he or she has provided prior written notice to the member.[28] The proposed rule would apply where a registered person is named to a position of trust for a customer of the member firm. If a registered person is approved to hold (and receive compensation for) a position of trust for a customer away from the member firm, the requirements of both the proposed rule change and Rule 3270 would apply to the activities away from the firm.[29]

Fitapelli and Silver Law supported rulemaking in this area, but stated that a registered person should not be permitted to be a beneficiary of or hold a position of trust

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27 See Bolton, Cambridge, Fitapelli and Silver Law.

28 FINRA is separately conducting a retrospective review of FINRA's rules governing outside business activities and private securities transactions, Rule 3270 and FINRA Rule 3280 (Private Securities Transactions of an Associated Person), respectively. See Regulatory Notice 18-08 (Outside Business Activities).

29 FINRA also reminds members of registered persons' separate reporting obligations for Form U4, including Form U4 section 13, Other Business.

for a customer who is not an immediate family member. Fitapelli also suggested requiring member firm notification and approval for situations involving a registered representative's dealings with immediate family members.

The proposed rule change applies to customers who are not immediate family members because of the greater potential risk that the registered person has been named a beneficiary or to a position of trust by virtue of the broker-customer relationship. Recognizing that a registered person and customer may have a close and longstanding friendship or relationship that may be akin to, but not actually, a familial relationship, the proposed rule change would not prohibit a registered person being named a beneficiary of or receiving a bequest from a customer's estate. However, given the potential conflicts of interest that can result in registered persons exploiting or taking advantage of being named beneficiaries or holding positions of trust for personal monetary gain, In assessing a registered person's request to be named a beneficiary of or receive a bequest from a customer's estate, FINRA would expect approval to be given only when the member firm has made a reasonable determination that the registered person being named a beneficiary or receiving a bequest from a customer does not present a risk of financial exploitation that the proposed rule change is designed to address. A member firm may choose to go beyond the proposed rule change to: (1) require notification and approval when a registered person is named a beneficiary or named to a position of trust for immediate family members; (2) further limit or prohibit registered persons from being named a customer's beneficiary or to a position of trust for a customer; or (3) impose additional obligations on the registered person when he or she is named a beneficiary or to a position of trust for a customer.

Cambridge agreed with many aspects of the Notice 19-36 Proposal but suggested some modifications. Cambridge stated that a mandatory rejection of the customer designating the registered person as a beneficiary could result in a scenario where the customer's intended designation would fail in its entirety and instead proposed adoption of a presumption in favor of the validity of the nomination unless and until, based on a subsequent review, the member firm determines that the nomination should not be honored.

Given the potential conflicts of interest, FINRA would expect a member firm to employ heightened scrutiny in assessing a registered person's request to be named a beneficiary of or receive a bequest from a customer's estate. Moreover, given the potential conflicts of interest, FINRA does not agree that a beneficiary designation should be presumed valid and free of potential conflicts of interest.

Cambridge also suggested that, because executorships may be subject to judicial review and often pertain to the customer's posthumous estate, the inclusion of executorships in the Notice 19-36 Proposal is unnecessary. However, n executorship may provide a registered person with significant control over a customer's finances and, consequently, may present significant conflicts of interest. As such, including executorships among the positions of trust that are covered by the proposed rule change is appropriate.

Opposition to the Notice 19-36 Proposal

An anonymous commenter did not support the Notice 19-36 Proposal because it may limit customer choice where a customer does not have another person to be named his or her beneficiary. FINRA has observed that investment professionals, including

registered persons, often develop close and trusted relationships with their customers, which in some instances have resulted in the investment professional being named the customer's beneficiary. However, being a customer's beneficiary may present significant conflicts of interest. FINRA would not expect a registered person's assertion that a customer has no viable alternative person to be named a beneficiary or to serve in a position of trust to be dispositive in the member firm's assessment.

Kaplon did not support the Notice 19-36 Proposal and suggested instead that member firm procedures are sufficient to address potential conflicts of interest. FINRA has observed that many, but not all, member firms address these potential conflicts by prohibiting or imposing limitations on being named as a beneficiary or to a position of trust when there is not a familial relationship. Even where a member firm has policies and procedures, FINRA has observed situations where registered representatives have tried to circumvent firm policies and procedures, such as resigning as a customer's registered representative, transferring the customer to another registered representative, or having the customer name the registered representative's spouse or child as the customer's beneficiary.

NASAA suggested that registered persons, their family members and any entities controlled by the registered persons should be prohibited from being named as a beneficiary or appointed to a position of trust by a customer unless the customer is an immediate family member. Moreover, NASAA suggested that even if the Notice 19-36 Proposal was limited to immediate family members, the registered person should be required to seek prior written authorization from the member firm and the member firm should be required to implement heightened supervision of the accounts. NASAA further

suggested that if FINRA proceeds with allowing registered persons to be named as beneficiaries or serve in positions of trust for customers beyond their immediate family members, FINRA should, at a minimum, require the member firm to implement heightened supervision of these accounts and should explicitly state that member firms may choose to limit or prohibit registered persons to be named as a beneficiary or serve in positions of trust.

As stated in Notice 19-36, FINRA considered an outright prohibition of some or all positions of trust, but decided against that approach as some positions of trust, if properly known to and supervised by member firms, may benefit customers. For example, assuming that the member firm has done a reasonable assessment of the potential conflicts of interest before making a reasonable determination to approve the arrangement, a registered person with financial acumen and knowledge of a customer's financial circumstances may be better positioned to serve in a position of trust than other alternatives available to the customer.

As discussed above, the proposed rule change applies to customers who are not immediate family member because of the greater potential risk that the registered person has been named a beneficiary or to a position of trust by virtue of the broker-customer relationship. The risk that a registered person misused his or her role in the broker-customer relationship to be named a beneficiary or hold a position of trust is reduced when the customer is an immediate family member.

As discussed in Item 3 supra, a member firm has supervisory obligations regarding any status or arrangement that is approved by the member firm. If the member firm imposes conditions or limitations on its approval, the member firm would be

required to reasonably supervise the registered person's compliance with the conditions or limitations.[30] Moreover, where a registered person is named a beneficiary, executor, or trustee or holds a power of attorney or a similar position for or on behalf of a customer account at the member firm with which the registered person is associated, the member firm must supervise the account in accordance with FINRA Rule 3110 (Supervision), including the longstanding obligation to follow-up on "red flags" indicating problematic activity. As to this latter point, with the notification and assessment of a registered person being named as a beneficiary or to a position of trust in relation to a customer account at the member firm, there is inherently more information from which red flags may surface. If a registered person is approved to hold (and receive compensation for) a position of trust for a customer away from the member firm, the requirements of both the proposed rule change and Rule 3270 regarding outside business activities would apply to the activities away from the firm.

As noted above, a member may choose to go beyond the proposed rule change to: (1) require notification and approval when a registered person is named a beneficiary or named to a position of trust for immediate family members; (2) further limit or prohibit registered persons from being named a customer's beneficiary or to a position of trust for a customer; or (3) impose additional obligations on the registered person when he or she is named a beneficiary or to a position of trust for a customer.

Knowledge

FSI and SIFMA agreed with the Notice 19-36 Proposal's approach to apply the proposed requirements only after the registered person has knowledge that he or she was

30 See proposed Rule 3241(b)(3).

named as a beneficiary or to a position of trust. Cole expressed general support for the Notice 19-36 Proposal but stated that a member firm should not be liable if the customer does not share his or her estate documents with the firm. Duran expressed concern about adopting a rule that would apply where the customer did not share his or her estate documents naming the registered person as a beneficiary and the registered person did not have control over the customer's action.

As discussed in Item 3 supra, a registered person being named as a beneficiary or to a position of trust without his or her knowledge would not violate the proposed rule change; however, the registered person must act consistent with the proposed rule change upon learning that he or she was named as a beneficiary or to a position of trust. The proposed rule change would apply when the registered person learns of his or her status as a customer's beneficiary or a position of trust for or on behalf of a customer. A registered person may: (1) provide notice to and receive approval from the member firm with which he or she is associated consistent with the proposed rule change; or (2) decline being named as a beneficiary or to a position of trust and decline receipt of any assets or other benefit from the customer's estate so as not to violate the proposed rule change.

Firm Notice and Approval

NASAA supported requiring a specific form of written notice for use by a registered person in requesting approval from the member firm with which he or she is associated. Absent a specific form, NASAA suggested providing guidance regarding the information the registered person should provide to the member firm. FINRA proposes to provide member firms with flexibility in what form of written notice is required

pursuant to the proposed rule change and, consequently, no specific form of written notice would be required by the proposed rule change. Because the proposed rule change requires each member firm to perform a reasonable assessment and make a determination of whether to approve or disapprove the status or arrangement, a member firm should obtain through the written notice or subsequent communications with the registered person or customer information sufficient upon which to perform the required assessment and make the related determination.

Reasonable Assessment and Determination

Cambridge requested clarification that the factors listed in Regulatory Notice 19-36 are not mandatory considerations as part of a member firm's assessment of whether to approve a position or arrangement. FINRA expects that a member firm's assessment would take into consideration several factors, such as the non-exhaustive list of factors provided in Regulatory Notice 19-36. While a factor may not be applicable to a particular situation, the factors considered by the member firm should allow for a reasonable assessment of the associated risks so that the member firm can make a reasonable determination of whether to approve the registered person assuming a status or acting in a capacity.

Cambridge also stated that it is neither appropriate nor reasonable to obligate a member firm to determine whether a customer suffers from an impairment as part of this assessment. In making the reasonable assessment and determination, a member firm is not required to seek to obtain a customer's medical information or make a medical determination related to a customer. However, a member firm may become aware of information related to the customer's physical or mental impairment as part of the

member firm's business relationship with the customer (e.g., the customer may indicate to the firm that she was diagnosed with dementia). In these circumstances, FINRA expects that a member firm would take into consideration a customer's known mental or physical impairment that renders the individual unable to protect his or her own interests (e.g., if the member firm is aware that the customer was diagnosed with dementia before naming the registered person as her beneficiary).

"Customer" Definition

To address attempted circumvention of the restrictions (e.g., by closing or transferring a customer's account), the proposed rule change would define "customer" to include any customer that has, or in the previous six months had, a securities account assigned to the registered person at any member firm. Commenters had differing views on the inclusion of a six-month look-back period in the proposed "customer" definition. Cambridge requested eliminating the phrase "or in the previous six months" from the proposed definition of "customer" because inclusion of the look-back period denies the member firm flexibility in accommodating fact-specific circumstances. NASAA, on the other hand, suggested that the proposed "customer" definition be amended to include a 12-month look-back provision to prevent circumvention of the restrictions.

The inclusion of the look-back period is important in addressing potential conflicts of interest and circumvention of the proposed rule change. FINRA believes the six-month period strikes an appropriate balance between achieving the regulatory objective of addressing circumvention of the proposed rule change by transferring the customer account to another registered person and imposing reasonable requirements on member firms in tracking account transfers.

"Immediate Family" Definition

Fitapelli suggested revising the definition of "immediate family" that was included in the Notice 19-36 Proposal to exclude the phrase "any other person whom the registered person financially supports, directly or indirectly, to a material extent" due to ambiguity and being outside of the conventional definition of "immediate family." NASAA suggested revising the phrase to require that any person who the registered person financially supports must also reside in the same household as the registered person.

In the proposed rule change, FINRA revised the relevant phrase in the proposed definition of "immediate family" to state "and any other person who resides in the same household as the registered person and the registered person financially supports, directly or indirectly, to a material extent." For example, the phrase as revised would apply to a foster child who resides with and is financially supported by the registered person but who has not yet been legally adopted. The incorporation of the requirement that the other person reside in the same household as the registered person and receive material financial support from the registered person focuses the scope of the proposed "immediate family" definition.

For purposes of the proposed definition of "immediate family," FSI suggested that a "cousin" mean only first cousins rather than second or more distant cousins. FINRA would interpret cousin in the "immediate family" definition to mean first cousins and not second or more distant cousins.

Scope

Kendrick questioned how the Notice 19-36 Proposal would apply to attorneys who hold securities licenses. The proposed rule change would apply to registered persons who have "customers" as defined by the proposed rule change (i.e., any customer that has, or in the previous six months had, a securities account assigned to the registered person at any member firm). A registered person also being licensed in another capacity (e.g., a state-licensed attorney) does not exempt the registered person from compliance with the proposed rule change. The proposed rule change would be triggered when the registered person is named a customer's beneficiary or receives a bequest from a customer or is named a customer's executor, trustee or holder of a power of attorney or similar position for a trustee. The proposed rule change would not be triggered when an individual who is not a "customer" so names a registered person. For example, a person may be registered with a member firm and hold a state law license. In this example, the proposed rule change would not be triggered when an individual who is not a "customer" under the rule names the registered person as the executor of the individual's estate.

SIFMA requested clarification that the Notice 19-36 Proposal applies only when the registered person services the account or is the broker of record for the account and does not apply when a registered person is named as a beneficiary or to a position of trust for any client of the member firm. The proposed rule change would apply to registered persons who have "customers" as defined by the proposed rule change. The proposed rule change would not be triggered when an individual who is not a "customer" (e.g., a client of the member firm who has not had a securities account assigned to the registered person in the last six months) so names a registered person.

Because some member firms have trust lines of business, SIFMA requested clarification that the Notice 19-36 Proposal is not intended to cover member firms acting in their capacity as a trustee in their trust lines of business. SIFMA stated its assumption that FINRA is focusing on individual registered persons who would be put in a position of trust in their personal capacity, not as a result of a member firm's authorized and approved business capacity.

A registered person may have a role or provide assistance where a member firm or affiliated entity offers a trust line of business. However, FINRA understands that a customer typically names the member firm or an affiliated entity—not a registered person—as trustee when the member firm or its affiliated entity offers a trust line of business. The proposed rule change would not apply where the customer names either the member firm or an affiliated entity as his or her trustee. However, the proposed rule change would apply where the customer names the individual registered person as his or her trustee.

In addition, a dually-registered representative may hold a power of attorney for a customer's discretionary investment advisory account. This power of attorney is intended to allow the investment adviser representative to manage the investment advisory account. The proposed rule change is not intended to address or impact a dually-registered representative holding a power of attorney or other similar instrument in order to manage a customer's investment advisory account.

NASAA stated that member firms should be required to advise customers in the account application of the applicable restrictions on the registered person being named a beneficiary or holding a position of trust for the customer. While a member firm may

include information about the applicable restrictions in the account application, FINRA believes that a conversation or another communication between the customer and the registered person or another associated person of the member firm can also be effective in addressing the potential conflicts of interest, restrictions imposed by the proposed rule change and any additional restrictions imposed by the member firm's procedures.

Naming Other Persons

Singer suggested that proposed Supplementary Material .06 applying the proposed rule change where the registered person instructs or asks a customer to name a third-party as the customer's beneficiary may not be sufficiently broad because: (1) the registered person could suggest or imply that the customer should name the third-party without instructing or asking; or (2) the third-party (e.g., the registered person's spouse) could communicate with the customer to avoid triggering the rule.

Proposed Supplementary Material .06 is intended to cover situations where the registered person attempts to circumvent the proposed rule change's restrictions. In these situations, the registered person may communicate with the customer in a manner where the registered person will seek to deny instructing or asking the customer to act and instead argue that the customer acted on his own volition (e.g., by having a third-party communicate with the customer). FINRA would interpret proposed Supplementary Material .06 broadly to cover these situations. For example, FINRA would interpret proposed Supplementary Material .06 to apply to situations where: (1) the registered person suggests or implies that the customer name another person, such as the registered person's spouse or child, to be a beneficiary of the customer's estate or to receive a bequest from the customer's estate; or (2) the registered person's spouse or another third

party acts on behalf of the registered person to communicate with the customer in an effort to avoid triggering the proposed rule change's requirements.

Pre-Existing Beneficiary Status and Positions of Trust

SIFMA asked for clarification about how the Notice 19-36 Proposal would apply to beneficiary designations and positions of trust that are currently in place. SIFMA stated that while many member firms currently have policies in this area, it would be challenging and time-consuming to conduct a full-scale retroactive review of all accounts across an organization to determine whether the arrangements currently in place are consistent with the proposed requirements. NASAA, on the other hand, does not support a "grandfathering" clause for beneficiary designations and positions of trust that are currently in place. Moreover, NASAA suggested that member firms should ask about the existence of any pre-existing position during the hiring process so that the relationship can be screened before the individual associates with the member firm.

Many, but not all, member firms currently have policies and procedures in place to address potential conflicts by prohibiting or imposing limitations on being named as a beneficiary or to a position of trust when there is not a familial relationship. Accordingly, member firms may have approved arrangements under the policies and procedures in place prior to the proposed rule change becoming effective. The proposed rule would apply if the registered person is named a beneficiary or receives a bequest from a customer's estate after the effective date of the rule. For the non-beneficiary positions, the proposed rule would apply to positions that the registered person was named to prior to the rule becoming effective only if the initiation of the broker-customer relationship was after the effective date of the proposed rule.

For example, a registered representative was named a beneficiary of a customer who is not an immediate family member in 2018, consistent with the firm's procedures, and the customer passes away after the proposed rule change becomes effective. The registered representative is notified by the executor that he is to receive a bequest of $5,000 from the customer's estate. Because the bequest would be received after the proposed rule change is effective, the registered representative would be required to provide written notice to the member firm and the member firm would be required to perform a reasonable assessment and determination of whether to approve or disapprove the registered representative receiving the bequest.

If a registered person was named as a beneficiary or to a position of trust prior to the registered person's association with the member firm, proposed Supplementary Material .04 would require the registered person, within 30 calendar days of becoming so associated, to provide notice to and receive approval from the member consistent with the rule to maintain the beneficiary status or position of trust. If a registered person was named to a position of trust prior to the proposed rule change becoming effective, proposed Supplementary Material .04 would apply if the registered person moved to a new member firm after the proposed rule change became effective.

For example, a registered representative was named a trustee by a customer who is not an immediate family member in 2018, consistent with Member Firm A's procedures. Notice to and approval by Member Firm A is not required in order for the registered representative to continue serving as the customer's trustee after the proposed rule change becomes effective. However, if the registered representative left Member Firm A to become associated with Member Firm B after the proposed rule change

became effective, proposed Supplementary Material .04 would apply and the registered representative would need to provide notice to and receive approval from Member Firm B in order to continue serving in the position.

Application beyond Broker-Dealers

Singer stated that "FINRA's best intentions can only be extended so far" and that state and federal laws may need to be revised to address the consequences of financial professionals taking advantage of elderly or vulnerable customers. FINRA welcomes the opportunity to work with other regulators to address misconduct in this area.

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.[31]

7. 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)

Not applicable.

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

Not applicable.

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

Not applicable.

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

Not applicable.

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31 15 U.S.C. 78s(b)(2).

11. Exhibits

Exhibit 1. Completed notice of proposed rule change for publication in the Federal Register.

Exhibit 2a. Regulatory Notice 19-36 (November 2019).

Exhibit 2b. List of commenters.

Exhibit 2c. Comments received in response to Regulatory Notice 19-36.

Exhibit 5. Text of proposed rule change.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- ; File No. SR-FINRA-2020-020)

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change to Adopt FINRA Rule 3241 (Registered Person Being Named a Customer's Beneficiary or Holding a Position of Trust for a Customer)

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. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to adopt FINRA Rule 3241 (Registered Person Being Named a Customer's Beneficiary or Holding a Position of Trust for a Customer).

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.

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

2 17 CFR 240.19b-4.

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

Background

Investment professionals, including registered persons of member firms, face potential conflicts of interest when they are named a customer's beneficiary, executor, or trustee or holding a power of attorney or a similar position for or on behalf of their customer. These conflicts of interest can take many forms and can include a registered person benefiting from the use of undue and inappropriate influence over important financial decisions to the detriment of a customer. Moreover, problematic arrangements may not become known to the member firm or customer's other beneficiaries or surviving family members for years. Senior investors who are isolated or suffering from cognitive decline are particularly vulnerable to harm.[3]

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3 See, e.g., SEC Office of the Investor Advocate, Elder Financial Exploitation White Paper (June 2018) and International Organization of Securities Commissions (IOSCO) Senior Investor Vulnerability Final Report (March 2018) (noting that senior investors are more vulnerable to financial exploitation due to social isolation, cognitive decline and other factors).

Many, but not all, member firms address these conflicts by prohibiting or imposing limitations on their investment professionals, including registered persons, being named as a beneficiary or to a position of trust when there is not a familial relationship.[4] Even where a member firm has policies and procedures, FINRA has observed situations where registered representatives have tried to circumvent firm policies and procedures, such as resigning as a customer's registered representative, transferring the customer to another registered representative, or having the customer name the registered representative's spouse or child as the customer's beneficiary.[5]

FINRA has taken steps to address misconduct in this area, including:

(1) Identifying effective practices for member firms;[6]

(2) Setting as an examination priority member firms' supervision of accounts where a registered representative is named a beneficiary, executor, or trustee or holds a power of attorney or a similar position for or on behalf of a customer who is not a family member;[7]

(3) Reviewing customer complaints received directly by FINRA and those reported by member firms pursuant to FINRA Rule 4530 (Reporting

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4 See Report on the FINRA Securities Helpline for Seniors (December 2015) and Report on FINRA Examination Findings (December 2018) (both discussing member firm policies observed by FINRA staff).

5 Supra note.

6 Supra note.

7 See FINRA 2018 Regulatory and Examination Priorities Letter (January 2018), FINRA 2019 Risk Monitoring and Examination Priorities Letter (January 2019), and FINRA Risk Monitoring and Examination Priorities Letter (January 2020).

Requirements) or Form U4 (Uniform Application for Securities Industry Registration or Transfer);

(4) Reviewing regulatory filings made by firms on Form U5 (Uniform Termination Notice for Securities Industry Registration related to terminations for cause) disclosing related issues;

(5) Reviewing matters referred by an arbitrator to FINRA for disciplinary investigation; and

(6) Depending on the facts and circumstances of the conduct at issue, bringing actions for violations of FINRA rules, such as 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), 3240 (Borrowing From or Lending to Customers) or 3270 (Outside Business Activities of Registered Persons).[8]

Proposed Rule Change

To further address potential conflicts of interest that can result in registered persons exploiting or taking advantage of being named beneficiaries or holding positions of trust for personal monetary gain, FINRA proposes adopting new Rule 3241 to create a uniform, national standard to govern registered persons holding positions of trust. This

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8 See, e.g., Robert Torcivia, Letter of Acceptance, Waiver and Consent, Case ID 2015044686701 (September 26, 2018) (finding, under the facts of the case, that the registered representative violated FINRA Rule 2010 in relation to accepting beneficiary designations and holding powers of attorney for senior customers and failing to inform the member firm of these positions).

new national standard will better protect investors and provide consistency across member firms' policies and procedures. Proposed Rule 3241 would provide that a registered person must decline:

(1) Being named a beneficiary of a customer's estate[9] or receiving a bequest from a customer's estate upon learning of such status unless the registered person provides written notice upon learning of such status and receives written approval from the member firm prior to being named a beneficiary of a customer's estate or receiving a bequest from a customer's estate; and

(2) Being named as an executor or trustee or holding a power of attorney or similar position for or on behalf of a customer unless:

(a) Upon learning of such status, the registered person provides written notice and receives written approval from the member firm prior to acting in such capacity or receiving any fees, assets or other benefit in relation to acting in such capacity; and

(b) The registered person does not derive financial gain from acting in such capacity other than from fees or other charges that are reasonable and customary for acting in such capacity.[10]

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9 For purposes of the proposed rule change, a customer's estate would include any cash and securities, real estate, insurance, trusts, annuities, business interests and other assets that the customer owns or has an interest in at the time of death. See proposed Supplementary Material .02 to Rule 3241. The proposed scope is consistent with includable property in a decedent's gross estate for federal tax purposes. See, e.g., IRS FAQs on Estate Taxes, available at https://www.irs.gov/businesses/small-businesses-self-employed/frequently-asked-questions-on-estate-taxes#2.

10 See proposed Rule 3241(a). For example, receipt of a gift from a customer for acting as an executor or trustee or holding a power of attorney or similar position

The proposed rule change would not apply where the customer is a member of the registered person's immediate family.[11] The proposed rule change applies to customers who are not immediate family members because of the greater potential risk that the registered person has been named a beneficiary or to a position of trust by virtue of the broker-customer relationship. The proposed rule change also would not affect the applicability of other rules (e.g., FINRA Rule 2150 regarding improper use of customer securities or funds). If the proposed rule change is approved, FINRA would assess registered persons' and firms' conduct pursuant to Rule 3241 to determine the effectiveness of the rule in addressing potential conflicts of interest and evaluate whether additional rulemaking or other action is appropriate.

Knowledge

A registered person being named as a beneficiary or to a position of trust without his or her knowledge would not violate the proposed rule change; however, the registered person must act consistent with the proposed rule change upon learning that he or she was named as a beneficiary or to a position of trust. The proposed rule change would apply when the registered person learns of his or her status as a customer's beneficiary or a position of trust for or on behalf of a customer. A registered person may decline being

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for or on behalf of the customer would be considered deriving financial gain from acting in such capacity.

11 The proposed rule change would define "immediate family" to mean parents, grandparents, mother-in-law or father-in-law, spouse or domestic partner, brother or sister, brother-in-law or sister-in-law, son-in law or daughter-in-law, children, grandchildren, cousin, aunt or uncle, or niece or nephew, and any other person who resides in the same household as the registered person and the registered person financially supports, directly or indirectly, to a material extent. The term includes step and adoptive relationships. See proposed Rule 3241(c).

named as a beneficiary or to a position of trust and decline receipt of any assets or other benefit from the customer's estate so as not to violate the proposed rule change. For example, if a customer named her registered person as her beneficiary without the beneficiary's knowledge, the proposed rule change would not apply and the registered person would not be in violation of the proposed rule change. However, when the registered person became aware of being so named (e.g., when the registered person is notified that he or she is to receive a bequest from the customer's estate), the requirements of the proposed rule change would apply and the registered person must act consistent with the proposed rule change (i.e., by declining the bequest unless he or she provides notice to and receives approval from the member firm).

Firm Notice and Approval

To provide flexibility to member firms, the proposed rule change does not prescribe any specific form of written notice and instead would permit a member firm to specify the required form of written notice for its registered persons. Upon receipt of the written notice, the proposed rule change would require the member firm to:

(1) Perform a reasonable assessment of the risks created by the registered person's assuming such status or acting in such capacity, including, but not limited to, an evaluation of whether it will interfere with or otherwise compromise the registered person's responsibilities to the customer;[12] and

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12 In the event that the customer is deceased when the registered person becomes aware that he or she was named the customer's beneficiary, FINRA would expect the member firm's reasonable assessment to include an evaluation of the registered person's relationship with the customer prior to the customer's death (e.g., any red flags of improper conduct by the registered person).

(2) Make a reasonable determination of whether to approve the registered person's assuming such status or acting in such capacity, to approve it subject to specific conditions or limitations, or to disapprove it.[13]

If a member firm approves the registered person's assuming such status or acting in such capacity, the member firm has supervisory responsibilities following approval. If the member firm imposes conditions or limitations on its approval, the member firm would be required to reasonably supervise the registered person's compliance with the conditions or limitations.[14] Moreover, where a registered person is knowingly named a beneficiary, executor, or trustee or holds a power of attorney or a similar position for or on behalf of a customer account at the member firm with which the registered person is associated and the member firm has approved the registered person assuming such status or position, the member firm must supervise the account in accordance with FINRA Rule 3110 (Supervision), including the longstanding obligation to follow-up on "red flags" indicating problematic activity. As to this latter point, with the notification and assessment of a registered person being named as a beneficiary or to a position of trust in relation to a customer account at the member firm, there is inherently more information from which red flags may surface. If a registered person is approved to hold (and receive compensation for) a position of trust for a customer away from the member firm, the requirements of both the proposed rule change and Rule 3270 regarding outside business activities would apply to the activities away from the firm.[15]

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13 See proposed Rule 3241(b).

14 See proposed Rule 3241(b)(3).

15 There may be arrangements where a registered person holds a position of trust for a customer away from the firm but the requirements of Rule 3270 do not apply

The proposed rule change would require a member firm to establish and maintain written procedures to comply with the rule's requirements.[16] The proposed rule change would also require member firms to preserve the written notice and approval for at least three years after the date that the beneficiary status or position of trust has terminated or the bequest received or for at least three years, whichever is earlier, after the registered person's association with the firm has terminated.[17] The proposed record retention requirement is similar to the requirement in Rule 3240.

Reasonable Assessment and Determination

FINRA expects that a member firm's reasonable assessment of the risks created by the registered person's assuming such status or acting in such capacity would take into consideration several factors, such as:

(1) Any potential conflicts of interest in the registered person being named a beneficiary or holding the position of trust;

(2) The length and type of relationship between the customer and registered person;

(3) The customer's age;

(4) The size of any bequest relative to the size of a customer's estate;

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because the arrangement is not one of the listed positions in Rule 3270 (i.e., an employee, independent contractor, sole proprietor, officer, director or partner of another person) or the registered person is not compensated, or have the reasonable expectation of compensation, from any other person as a result of any business activity outside the scope of the relationship with his member firm.

16 See proposed Rule 3241(b)(4).

17 See proposed Supplementary Material .03 to Rule 3241.

(5) Whether the registered representative has received other bequests or been named a beneficiary on other customer accounts.

(6) Whether, based on the facts and circumstances observed in the member's business relationship with the customer, the customer has a mental or physical impairment that renders the customer unable to protect his or her own interests;

(7) Any indicia of improper activity or conduct with respect to the customer or the customer's account (e.g., excessive trading); and

(8) Any indicia of customer vulnerability or undue influence of the registered person over the customer.

This list is not intended to be an exhaustive list of factors that a member firm may consider as part of its assessment. Moreover, while a listed factor may not be applicable to a particular situation, the factors that a member firm considers should allow for a reasonable assessment of the associated risks so that the member firm can make a reasonable determination of whether to approve the registered person assuming a status or acting in a capacity.

For example, a registered person's request to hold a position of trust for an elderly customer who had no relationship with the representative prior to the initiation of the broker-customer relationship is likely to present different risks than a registered person's request to hold a position of trust for a longstanding friend. FINRA would not expect a registered person's assertion that a customer has no viable alternative person to be named a beneficiary or to serve in a position of trust to be dispositive in the member firm's assessment.

The proposed rule change would not prohibit a registered person being named a beneficiary of or receiving a bequest from a customer's estate. However, given the potential conflicts of interest, under the proposed rule change a member firm would need to carefully assess a registered person's request to be named a beneficiary of or receive a bequest from a customer's estate, and reasonably determine that the registered person assuming such status does not present a risk of financial exploitation (e.g., a registered person receiving a bequest from a customer who has been a godparent since childhood or a customer who has been a friend since childhood) that the proposed rule is designed to address.

If possible, as part of the reasonable assessment of the risks, FINRA would expect a member firm to discuss the potential beneficiary status or position of trust with the customer as part of its reasonable determination of whether to approve the registered person assuming the status or acting in the capacity.

Scope of Proposed Rule

To address attempted circumvention of the restrictions (e.g., by closing or transferring a customer's account), the proposed rule change would define "customer" to include any customer that has, or in the previous six months had, a securities account assigned to the registered person at any member firm.[18] Member firms have flexibility to

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[18] See proposed Supplementary Material .01 to Rule 3241. A securities account would include, for example, a brokerage account, mutual fund account or variable insurance product account. For purposes of the proposed rule change, therefore, a registered person who is listed as the broker of record on a customer's account application for an account held directly at a mutual fund or variable insurance product issuer would be subject to the proposed rule's obligations (this is sometimes referred to as "check and application," "application way," or "direct application" business).

reasonably design their supervisory systems to achieve compliance with the proposed rule change (e.g., by using training, certifications or other measures). In addition, as discussed below, the proposed rule change would require the registered person, within 30 calendar days of becoming so associated, to provide notice to and receive approval from the member consistent with the rule to maintain the beneficiary status or position of trust.[19]

A registered person who does not have customer accounts assigned to him or her would not be subject to the proposed rule change. In addition, a registered person instructing or asking a customer to name another person to be a beneficiary of the customer's estate or to receive a bequest from the customer's estate would present similar conflict of interest concerns as the registered person being so named. Accordingly, the proposed rule change would not allow a registered person to instruct or ask a customer to name another person, such as the registered person's spouse or child, to be a beneficiary of the customer's estate or to receive a bequest from the customer's estate.[20]

Beneficiary Status and Positions of Trust Prior to Association with Member Firm

Registered persons move with some frequency between member firms. If a registered person was named as a beneficiary or to a position of trust prior to the registered person's association with the member firm, the proposed rule change would require the registered person, within 30 calendar days of becoming so associated, to

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19 See proposed Supplementary Material .04 to Rule 3241.

20 See proposed Supplementary Material .06 to Rule 3241.

provide notice to and receive approval from the member consistent with the rule to maintain the beneficiary status or position of trust.[21]

Pre-Existing Beneficiary Status and Positions of Trust

Potential conflicts of interest also exist when the beneficiary status or position of trust was entered into prior to the existence of a broker-customer relationship, such as where the customer was not a customer of the registered person at the time at which the registered person was named beneficiary or to a position of trust. These situations also have the potential that investment and other financial decisions will benefit the registered person as the customer's beneficiary or holder of a position of trust rather than the customer. Therefore, the proposed rule change would require the registered person and member firm to act consistent with the rule for any existing beneficiary status or position of trust prior to the initiation of the broker-customer relationship.[22]

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

2. Statutory Basis

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21 See proposed Supplementary Material .04 to Rule 3241.

22 See proposed Supplementary Material .05 to Rule 3241. The proposed rule change would apply if the registered person is named a beneficiary or receives a bequest from a customer's estate after the effective date of the rule. For the non-beneficiary positions, the proposed rule change would apply to positions that the registered person was named to prior to the rule becoming effective only if the initiation of the broker-customer relationship was after the effective date of the proposed rule.

The proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, 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.

FINRA believes that the proposed rule change would result in minimal costs to member firms, while providing additional investor protections where such policies do not currently exist, are not consistently applied or are less restrictive than the proposed changes. The proposed rule change will ultimately benefit the investor community, and promote greater trust in the brokerage industry, by reducing the potential exploitation of vulnerable investors. FINRA believes that establishing an industry-wide benchmark for situations in which registered persons request member firm approval to be named beneficiaries or to positions of trust mitigate potential conflicts of interest consistently across the industry for all customers.

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

FINRA does not believe that the proposed rule change would 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 rule change.

Economic Impact Assessment

FINRA has undertaken an economic impact assessment, as set forth below, to further analyze the regulatory need for the proposed rule change, its potential economic impacts, including anticipated costs, benefits, and distributional and competitive effects, relative to the current baseline, and the alternatives FINRA considered in assessing how best to meet its regulatory objective.

Regulatory Need

FINRA is active in its efforts to protect senior and financially vulnerable investors from exploitation. In the context of these efforts, and with evidence of a growing trend of such exploitation, FINRA has recognized the potential conflict of interests that can arise from having a customer name their registered representative as a beneficiary or to a position of trust. To mitigate such conflicts of interest, as well as any potential resulting harm, FINRA is proposing adoption of Rule 3241.

Economic Baseline

The economic baseline for the proposed rule change is based on the existing firm policies and practices on beneficiary status and positions of trust, as well as the prevalence of registered persons being named in such capacity. To gauge the extent of both, FINRA has sought information with regard to current practices from a sample of member firms and trade associations. Specifically, FINRA sought information on current practices from firms represented on FINRA advisory committees and engaged trade associations in conversations. Information obtained indicates that the majority of firms have existing policies in place with respect to registered persons being named beneficiaries or to positions of trust.

The majority of member firms that participated in FINRA's outreach efforts indicated that they currently do not permit a registered person to be named a beneficiary for a customer who is not a family member, with some variations on how family relationship is defined. Firms indicated that they are more likely to allow registered persons to be named to positions of trust, in compliance with the firm's internal processes and procedures. Registered persons are typically required to request approval from the

member firm to be named as a beneficiary or to a position of trust. Approval is usually requested through the outside business activities submission process. Monitoring of compliance with the procedures is conducted through the member firms' various control functions including, for example, branch exams, annual questionnaire responses, and supervisory review of emails. FINRA understands, based on anecdotal information collected through its outreach efforts, that over the past five years more than 85% of such requests by registered persons have been on behalf of immediate family members.

Economic Impacts

FINRA believes that the economic impacts of the proposed rule change would result in minimal costs to member firms, while benefiting the investor community by providing additional investor protections where such policies do not currently exist, are not consistently applied or are less restrictive than the proposed changes.

The proposed rule change will ultimately benefit the investor community, and promote greater trust in the brokerage industry, by potentially reducing the exploitation of vulnerable investors. FINRA believes that establishing an industry-wide benchmark for situations in which registered persons request to be named beneficiaries or to positions of trust mitigate potential conflicts of interest consistently across the industry for all customers. As described above, such conflicts of interest can include, but are not limited to, a registered person benefiting from the use of undue and inappropriate influence over important financial decisions to the detriment of a customer.

Anecdotal information provided to FINRA indicates that most member firms that participated in the outreach efforts have in place both specific policies and procedures to manage requests for registered persons to act in a position of trust, as well as mechanisms

to monitor compliance. FINRA believes that where member firms already have these types of policies and procedures in place, the costs of the proposed rule change should be low, mostly stemming from compliance requirements. For example, FINRA observed some variation in firm policies regarding whether a registered person may be named a customer's beneficiary after transferring the customer account to another registered person. As this specific issue could result in circumvention of the regulatory intent of the proposed rule, FINRA is proposing to include a six-month look-back period with respect to the customer-registered person relationships. FINRA believes that this will provide some guardrails against attempts to circumvent the proposed rule, while imposing minimal costs on firms with respect to monitoring of transfers of accounts.

Member firms with different policies and procedures, whether more or less restrictive than proposed here, would likely incur costs to amend them. Those firms required to establish a higher standard for these activities may also incur new on-going supervisory costs. The same would be true for those member firms with no current policies or procedures covering these situations. Member firms with existing practices that are more restrictive than the proposed rule change could maintain those policies. However, member firms altering their current policies and procedures to be in alignment with the proposed rule change are expected to incur one-time costs to do so. Member firms will also incur some costs to provide training on the new requirements for registered persons.

FINRA recognizes that the proposed rule change can result in a diminishing of customer choice in identifying a person to serve in a capacity of trust. There may be circumstances where the registered person represents a better alternative to the customer

than other available options. There may also be costs to a customer to amend estate or other legal documents if the member firm disapproves a registered person being named a beneficiary, executor, or trustee or holding a power of attorney or a similar position for or on behalf of the customer. Despite the potential loss of an appropriate person to serve in a capacity of trust or potential costs to a customer to amend estate or other legal documents, FINRA believes that this cost is justified by the protections afforded to investors by significantly mitigating the particular conflict of interest.

FINRA recognizes that investment advisers, as well as other financial services professionals under different regulatory oversight, potentially have similar conflicts of interest with their customers when engaged in these activities. This is the case because the conflict of interest is not unique to the brokerage industry. Rather, the conflict arises from the pecuniary benefits that may accrue because of the nature of the relationship between the customer and the financial professional. However, there is no available information or data to permit FINRA to gauge the prevalence and impact of such relationships between these other financial professionals and their customers. Further, it is difficult to gauge the circumstances under which differences in the regulatory treatment of this activity would impact competition.

Alternatives Considered

FINRA considered various alternatives to the provisions in the proposed rule change. One alternative considered was prohibiting a registered person from inducing a customer to name the registered person as a beneficiary of the customer's estate. FINRA believes that the proposed rule change is a better approach for addressing potential conflicts of interest because of the inherent difficulty in proving inducement. Second,

FINRA considered an outright prohibition of some or all positions of trust, but decided against that approach as some positions of trust, if properly known to and supervised by member firms, may benefit customers. Third, FINRA understands that member firms may have different approaches to defining family members in their current policies. FINRA considered different definitions of the term "immediate family," and ultimately based the definition in the proposed rule change on the definition in Rule 3240 with some changes to modernize the scope of covered persons and to incorporate the requirement that the other person reside in the same household as the registered person. FINRA believes that this approach is appropriate given that member firms have the discretion to review and approve arrangements with customers who are not "immediate family" as defined in the proposed rule change, but may be considered family members in member firms' current policies.

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 19-36 (November 2019) ("Notice 19-36 Proposal"). FINRA received 17 comment letters in response to the Notice 19-36 Proposal. A copy of the Notice 19-36 Proposal is attached as Exhibit 2a. Copies of the comment letters received in response to the Notice 19-36 Proposal are attached as Exhibit 2c.[23]

The comments and FINRA's responses are set forth in detail below.

Support for the Notice 19-36 Proposal

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

Six commenters expressed support for the Notice 19-36 Proposal.[24] For example, ASA supported the proposed approach and stated that for most member firms, the Notice 19-36 Proposal would not fundamentally alter current practices or significantly increase the costs of compliance but would help crack down on those instances where unscrupulous actors within the industry try to exploit existing loopholes within the regulatory framework. FSI stated that the Notice 19-36 Proposal establishes clear parameters for member firms and financial professional to follow and appropriately allows member firms the flexibility to tailor the process to their unique business model.

While supporting the Notice 19-36 Proposal, the St. John's Clinic suggested also requiring member firms to disclose more information about a broker's employment status and reason for termination than would otherwise be available on BrokerCheck as a registered person may obtain a position of trust shortly after being terminated by a member firm. Mack also supported the Notice 19-36 Proposal and suggested requiring additional supervision and a surprise audit requirement when a registered person has been approved to hold a position of trust for a customer. Requirements related to disclosing more information about a registered person's employment status and reasons for termination than would otherwise be available on BrokerCheck are beyond the scope of the proposed rule change. If the proposed rule change is approved, FINRA would assess registered persons' and firms' conduct pursuant to the rule to determine the effectiveness of the rule in addressing potential conflicts of interest and evaluate whether additional rulemaking or other action is appropriate

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24 See ASA, FSI, Mack, PIABA, SIFMA and St. John's Clinic.

Four additional commenters expressed support for some aspects of the Notice 19-36 Proposal but suggested material changes to the Notice 19-36 Proposal.[25] Bolton supported the Notice 19-36 Proposal's addressing a registered person being named a customer's beneficiary, but suggested that holding positions of trust could be addressed under the outside business activity framework in existing FINRA rules.

The proposed rule change's requirement that a registered person provide notice to and receive approval from the member with which he or she is associated is similar to the requirements for notice and approval of outside business activities in Rule 3270. Pursuant to Rule 3270, no registered person may be an employee, independent contractor, sole proprietor, officer, director or partner of another person, or be compensated from any other person as a result of any business activity away from the member firm, unless he or she has provided prior written notice to the member.[26] The proposed rule would apply where a registered person is named to a position of trust for a customer of the member firm. If a registered person is approved to hold (and receive compensation for) a position of trust for a customer away from the member firm, the requirements of both the proposed rule change and Rule 3270 would apply to the activities away from the firm.[27]

Fitapelli and Silver Law supported rulemaking in this area, but stated that a registered person should not be permitted to be a beneficiary of or hold a position of trust

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25 See Bolton, Cambridge, Fitapelli and Silver Law.

26 FINRA is separately conducting a retrospective review of FINRA's rules governing outside business activities and private securities transactions, Rule 3270 and FINRA Rule 3280 (Private Securities Transactions of an Associated Person), respectively. See Regulatory Notice 18-08 (Outside Business Activities).

27 FINRA also reminds members of registered persons' separate reporting obligations for Form U4, including Form U4 section 13, Other Business.

for a customer who is not an immediate family member. Fitapelli also suggested requiring member firm notification and approval for situations involving a registered representative's dealings with immediate family members.

The proposed rule change applies to customers who are not immediate family members because of the greater potential risk that the registered person has been named a beneficiary or to a position of trust by virtue of the broker-customer relationship. Recognizing that a registered person and customer may have a close and longstanding friendship or relationship that may be akin to, but not actually, a familial relationship, the proposed rule change would not prohibit a registered person being named a beneficiary of or receiving a bequest from a customer's estate. However, given the potential conflicts of interest that can result in registered persons exploiting or taking advantage of being named beneficiaries or holding positions of trust for personal monetary gain, In assessing a registered person's request to be named a beneficiary of or receive a bequest from a customer's estate, FINRA would expect approval to be given only when the member firm has made a reasonable determination that the registered person being named a beneficiary or receiving a bequest from a customer does not present a risk of financial exploitation that the proposed rule change is designed to address. A member firm may choose to go beyond the proposed rule change to: (1) require notification and approval when a registered person is named a beneficiary or named to a position of trust for immediate family members; (2) further limit or prohibit registered persons from being named a customer's beneficiary or to a position of trust for a customer; or (3) impose additional obligations on the registered person when he or she is named a beneficiary or to a position of trust for a customer.

Cambridge agreed with many aspects of the Notice 19-36 Proposal but suggested some modifications. Cambridge stated that a mandatory rejection of the customer designating the registered person as a beneficiary could result in a scenario where the customer's intended designation would fail in its entirety and instead proposed adoption of a presumption in favor of the validity of the nomination unless and until, based on a subsequent review, the member firm determines that the nomination should not be honored.

Given the potential conflicts of interest, FINRA would expect a member firm to employ heightened scrutiny in assessing a registered person's request to be named a beneficiary of or receive a bequest from a customer's estate. Moreover, given the potential conflicts of interest, FINRA does not agree that a beneficiary designation should be presumed valid and free of potential conflicts of interest.

Cambridge also suggested that, because executorships may be subject to judicial review and often pertain to the customer's posthumous estate, the inclusion of executorships in the Notice 19-36 Proposal is unnecessary. However, n executorship may provide a registered person with significant control over a customer's finances and, consequently, may present significant conflicts of interest. As such, including executorships among the positions of trust that are covered by the proposed rule change is appropriate.

Opposition to the Notice 19-36 Proposal

An anonymous commenter did not support the Notice 19-36 Proposal because it may limit customer choice where a customer does not have another person to be named his or her beneficiary. FINRA has observed that investment professionals, including

registered persons, often develop close and trusted relationships with their customers, which in some instances have resulted in the investment professional being named the customer's beneficiary. However, being a customer's beneficiary may present significant conflicts of interest. FINRA would not expect a registered person's assertion that a customer has no viable alternative person to be named a beneficiary or to serve in a position of trust to be dispositive in the member firm's assessment.

Kaplon did not support the Notice 19-36 Proposal and suggested instead that member firm procedures are sufficient to address potential conflicts of interest. FINRA has observed that many, but not all, member firms address these potential conflicts by prohibiting or imposing limitations on being named as a beneficiary or to a position of trust when there is not a familial relationship. Even where a member firm has policies and procedures, FINRA has observed situations where registered representatives have tried to circumvent firm policies and procedures, such as resigning as a customer's registered representative, transferring the customer to another registered representative, or having the customer name the registered representative's spouse or child as the customer's beneficiary.

NASAA suggested that registered persons, their family members and any entities controlled by the registered persons should be prohibited from being named as a beneficiary or appointed to a position of trust by a customer unless the customer is an immediate family member. Moreover, NASAA suggested that even if the Notice 19-36 Proposal was limited to immediate family members, the registered person should be required to seek prior written authorization from the member firm and the member firm should be required to implement heightened supervision of the accounts. NASAA further

suggested that if FINRA proceeds with allowing registered persons to be named as beneficiaries or serve in positions of trust for customers beyond their immediate family members, FINRA should, at a minimum, require the member firm to implement heightened supervision of these accounts and should explicitly state that member firms may choose to limit or prohibit registered persons to be named as a beneficiary or serve in positions of trust.

As stated in Notice 19-36, FINRA considered an outright prohibition of some or all positions of trust, but decided against that approach as some positions of trust, if properly known to and supervised by member firms, may benefit customers. For example, assuming that the member firm has done a reasonable assessment of the potential conflicts of interest before making a reasonable determination to approve the arrangement, a registered person with financial acumen and knowledge of a customer's financial circumstances may be better positioned to serve in a position of trust than other alternatives available to the customer.

As discussed above, the proposed rule change applies to customers who are not immediate family member because of the greater potential risk that the registered person has been named a beneficiary or to a position of trust by virtue of the broker-customer relationship. The risk that a registered person misused his or her role in the broker-customer relationship to be named a beneficiary or hold a position of trust is reduced when the customer is an immediate family member.

As discussed in Item II supra, a member firm has supervisory obligations regarding any status or arrangement that is approved by the member firm. If the member firm imposes conditions or limitations on its approval, the member firm would be

required to reasonably supervise the registered person's compliance with the conditions or limitations.[28] Moreover, where a registered person is named a beneficiary, executor, or trustee or holds a power of attorney or a similar position for or on behalf of a customer account at the member firm with which the registered person is associated, the member firm must supervise the account in accordance with FINRA Rule 3110 (Supervision), including the longstanding obligation to follow-up on "red flags" indicating problematic activity. As to this latter point, with the notification and assessment of a registered person being named as a beneficiary or to a position of trust in relation to a customer account at the member firm, there is inherently more information from which red flags may surface. If a registered person is approved to hold (and receive compensation for) a position of trust for a customer away from the member firm, the requirements of both the proposed rule change and Rule 3270 regarding outside business activities would apply to the activities away from the firm.

As noted above, a member may choose to go beyond the proposed rule change to: (1) require notification and approval when a registered person is named a beneficiary or named to a position of trust for immediate family members; (2) further limit or prohibit registered persons from being named a customer's beneficiary or to a position of trust for a customer; or (3) impose additional obligations on the registered person when he or she is named a beneficiary or to a position of trust for a customer.

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[28] See proposed Rule 3241(b)(3).

Knowledge

FSI and SIFMA agreed with the Notice 19-36 Proposal's approach to apply the proposed requirements only after the registered person has knowledge that he or she was named as a beneficiary or to a position of trust. Cole expressed general support for the Notice 19-36 Proposal but stated that a member firm should not be liable if the customer does not share his or her estate documents with the firm. Duran expressed concern about adopting a rule that would apply where the customer did not share his or her estate documents naming the registered person as a beneficiary and the registered person did not have control over the customer's action.

As discussed in Item II supra, a registered person being named as a beneficiary or to a position of trust without his or her knowledge would not violate the proposed rule change; however, the registered person must act consistent with the proposed rule change upon learning that he or she was named as a beneficiary or to a position of trust. The proposed rule change would apply when the registered person learns of his or her status as a customer's beneficiary or a position of trust for or on behalf of a customer. A registered person may: (1) provide notice to and receive approval from the member firm with which he or she is associated consistent with the proposed rule change; or (2) decline being named as a beneficiary or to a position of trust and decline receipt of any assets or other benefit from the customer's estate so as not to violate the proposed rule change.

Firm Notice and Approval

NASAA supported requiring a specific form of written notice for use by a registered person in requesting approval from the member firm with which he or she is

associated. Absent a specific form, NASAA suggested providing guidance regarding the information the registered person should provide to the member firm. FINRA proposes to provide member firms with flexibility in what form of written notice is required pursuant to the proposed rule change and, consequently, no specific form of written notice would be required by the proposed rule change. Because the proposed rule change requires each member firm to perform a reasonable assessment and make a determination of whether to approve or disapprove the status or arrangement, a member firm should obtain through the written notice or subsequent communications with the registered person or customer information sufficient upon which to perform the required assessment and make the related determination.

Reasonable Assessment and Determination

Cambridge requested clarification that the factors listed in Regulatory Notice 19-36 are not mandatory considerations as part of a member firm's assessment of whether to approve a position or arrangement. FINRA expects that a member firm's assessment would take into consideration several factors, such as the non-exhaustive list of factors provided in Regulatory Notice 19-36. While a factor may not be applicable to a particular situation, the factors considered by the member firm should allow for a reasonable assessment of the associated risks so that the member firm can make a reasonable determination of whether to approve the registered person assuming a status or acting in a capacity.

Cambridge also stated that it is neither appropriate nor reasonable to obligate a member firm to determine whether a customer suffers from an impairment as part of this assessment. In making the reasonable assessment and determination, a member firm is

not required to seek to obtain a customer's medical information or make a medical determination related to a customer. However, a member firm may become aware of information related to the customer's physical or mental impairment as part of the member firm's business relationship with the customer (e.g., the customer may indicate to the firm that she was diagnosed with dementia). In these circumstances, FINRA expects that a member firm would take into consideration a customer's known mental or physical impairment that renders the individual unable to protect his or her own interests (e.g., if the member firm is aware that the customer was diagnosed with dementia before naming the registered person as her beneficiary).

"Customer" Definition

To address attempted circumvention of the restrictions (e.g., by closing or transferring a customer's account), the proposed rule change would define "customer" to include any customer that has, or in the previous six months had, a securities account assigned to the registered person at any member firm. Commenters had differing views on the inclusion of a six-month look-back period in the proposed "customer" definition. Cambridge requested eliminating the phrase "or in the previous six months" from the proposed definition of "customer" because inclusion of the look-back period denies the member firm flexibility in accommodating fact-specific circumstances. NASAA, on the other hand, suggested that the proposed "customer" definition be amended to include a 12-month look-back provision to prevent circumvention of the restrictions.

The inclusion of the look-back period is important in addressing potential conflicts of interest and circumvention of the proposed rule change. FINRA believes the six-month period strikes an appropriate balance between achieving the regulatory

objective of addressing circumvention of the proposed rule change by transferring the customer account to another registered person and imposing reasonable requirements on member firms in tracking account transfers.

"Immediate Family" Definition

Fitapelli suggested revising the definition of "immediate family" that was included in the Notice 19-36 Proposal to exclude the phrase "any other person whom the registered person financially supports, directly or indirectly, to a material extent" due to ambiguity and being outside of the conventional definition of "immediate family." NASAA suggested revising the phrase to require that any person who the registered person financially supports must also reside in the same household as the registered person.

In the proposed rule change, FINRA revised the relevant phrase in the proposed definition of "immediate family" to state "and any other person who resides in the same household as the registered person and the registered person financially supports, directly or indirectly, to a material extent." For example, the phrase as revised would apply to a foster child who resides with and is financially supported by the registered person but who has not yet been legally adopted. The incorporation of the requirement that the other person reside in the same household as the registered person and receive material financial support from the registered person focuses the scope of the proposed "immediate family" definition.

For purposes of the proposed definition of "immediate family," FSI suggested that a "cousin" mean only first cousins rather than second or more distant cousins. FINRA

would interpret cousin in the "immediate family" definition to mean first cousins and not second or more distant cousins.

Scope

Kendrick questioned how the Notice 19-36 Proposal would apply to attorneys who hold securities licenses. The proposed rule change would apply to registered persons who have "customers" as defined by the proposed rule change (i.e., any customer that has, or in the previous six months had, a securities account assigned to the registered person at any member firm). A registered person also being licensed in another capacity (e.g., a state-licensed attorney) does not exempt the registered person from compliance with the proposed rule change. The proposed rule change would be triggered when the registered person is named a customer's beneficiary or receives a bequest from a customer or is named a customer's executor, trustee or holder of a power of attorney or similar position for a trustee. The proposed rule change would not be triggered when an individual who is not a "customer" so names a registered person. For example, a person may be registered with a member firm and hold a state law license. In this example, the proposed rule change would not be triggered when an individual who is not a "customer" under the rule names the registered person as the executor of the individual's estate.

SIFMA requested clarification that the Notice 19-36 Proposal applies only when the registered person services the account or is the broker of record for the account and does not apply when a registered person is named as a beneficiary or to a position of trust for any client of the member firm. The proposed rule change would apply to registered persons who have "customers" as defined by the proposed rule change. The proposed rule change would not be triggered when an individual who is not a "customer" (e.g., a

client of the member firm who has not had a securities account assigned to the registered person in the last six months) so names a registered person.

Because some member firms have trust lines of business, SIFMA requested clarification that the Notice 19-36 Proposal is not intended to cover member firms acting in their capacity as a trustee in their trust lines of business. SIFMA stated its assumption that FINRA is focusing on individual registered persons who would be put in a position of trust in their personal capacity, not as a result of a member firm's authorized and approved business capacity.

A registered person may have a role or provide assistance where a member firm or affiliated entity offers a trust line of business. However, FINRA understands that a customer typically names the member firm or an affiliated entity—not a registered person—as trustee when the member firm or its affiliated entity offers a trust line of business. The proposed rule change would not apply where the customer names either the member firm or an affiliated entity as his or her trustee. However, the proposed rule change would apply where the customer names the individual registered person as his or her trustee.

In addition, a dually-registered representative may hold a power of attorney for a customer's discretionary investment advisory account. This power of attorney is intended to allow the investment adviser representative to manage the investment advisory account. The proposed rule change is not intended to address or impact a dually-registered representative holding a power of attorney or other similar instrument in order to manage a customer's investment advisory account.

NASAA stated that member firms should be required to advise customers in the account application of the applicable restrictions on the registered person being named a beneficiary or holding a position of trust for the customer. While a member firm may include information about the applicable restrictions in the account application, FINRA believes that a conversation or another communication between the customer and the registered person or another associated person of the member firm can also be effective in addressing the potential conflicts of interest, restrictions imposed by the proposed rule change and any additional restrictions imposed by the member firm's procedures.

Naming Other Persons

Singer suggested that proposed Supplementary Material .06 applying the proposed rule change where the registered person instructs or asks a customer to name a third-party as the customer's beneficiary may not be sufficiently broad because: (1) the registered person could suggest or imply that the customer should name the third-party without instructing or asking; or (2) the third-party (e.g., the registered person's spouse) could communicate with the customer to avoid triggering the rule.

Proposed Supplementary Material .06 is intended to cover situations where the registered person attempts to circumvent the proposed rule change's restrictions. In these situations, the registered person may communicate with the customer in a manner where the registered person will seek to deny instructing or asking the customer to act and instead argue that the customer acted on his own volition (e.g., by having a third-party communicate with the customer). FINRA would interpret proposed Supplementary Material .06 broadly to cover these situations. For example, FINRA would interpret proposed Supplementary Material .06 to apply to situations where: (1) the registered

person suggests or implies that the customer name another person, such as the registered person's spouse or child, to be a beneficiary of the customer's estate or to receive a bequest from the customer's estate; or (2) the registered person's spouse or another third party acts on behalf of the registered person to communicate with the customer in an effort to avoid triggering the proposed rule change's requirements.

Pre-Existing Beneficiary Status and Positions of Trust

SIFMA asked for clarification about how the Notice 19-36 Proposal would apply to beneficiary designations and positions of trust that are currently in place. SIFMA stated that while many member firms currently have policies in this area, it would be challenging and time-consuming to conduct a full-scale retroactive review of all accounts across an organization to determine whether the arrangements currently in place are consistent with the proposed requirements. NASAA, on the other hand, does not support a "grandfathering" clause for beneficiary designations and positions of trust that are currently in place. Moreover, NASAA suggested that member firms should ask about the existence of any pre-existing position during the hiring process so that the relationship can be screened before the individual associates with the member firm.

Many, but not all, member firms currently have policies and procedures in place to address potential conflicts by prohibiting or imposing limitations on being named as a beneficiary or to a position of trust when there is not a familial relationship. Accordingly, member firms may have approved arrangements under the policies and procedures in place prior to the proposed rule change becoming effective. The proposed rule would apply if the registered person is named a beneficiary or receives a bequest from a customer's estate after the effective date of the rule. For the non-beneficiary

positions, the proposed rule would apply to positions that the registered person was named to prior to the rule becoming effective only if the initiation of the broker-customer relationship was after the effective date of the proposed rule.

For example, a registered representative was named a beneficiary of a customer who is not an immediate family member in 2018, consistent with the firm's procedures, and the customer passes away after the proposed rule change becomes effective. The registered representative is notified by the executor that he is to receive a bequest of $5,000 from the customer's estate. Because the bequest would be received after the proposed rule change is effective, the registered representative would be required to provide written notice to the member firm and the member firm would be required to perform a reasonable assessment and determination of whether to approve or disapprove the registered representative receiving the bequest.

If a registered person was named as a beneficiary or to a position of trust prior to the registered person's association with the member firm, proposed Supplementary Material .04 would require the registered person, within 30 calendar days of becoming so associated, to provide notice to and receive approval from the member consistent with the rule to maintain the beneficiary status or position of trust. If a registered person was named to a position of trust prior to the proposed rule change becoming effective, proposed Supplementary Material .04 would apply if the registered person moved to a new member firm after the proposed rule change became effective.

For example, a registered representative was named a trustee by a customer who is not an immediate family member in 2018, consistent with Member Firm A's procedures. Notice to and approval by Member Firm A is not required in order for the

registered representative to continue serving as the customer's trustee after the proposed rule change becomes effective. However, if the registered representative left Member Firm A to become associated with Member Firm B after the proposed rule change became effective, proposed Supplementary Material .04 would apply and the registered representative would need to provide notice to and receive approval from Member Firm B in order to continue serving in the position.

Application beyond Broker-Dealers

Singer stated that "FINRA's best intentions can only be extended so far" and that state and federal laws may need to be revised to address the consequences of financial professionals taking advantage of elderly or vulnerable customers. FINRA welcomes the opportunity to work with other regulators to address misconduct in this area.

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 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-2020-020 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-FINRA-2020-020. 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only

information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2020-020 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.[29]

Jill M. Peterson
Assistant Secretary

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29 17 CFR 200.30-3(a)(12).

Exhibit 2a

Regulatory Notice 19-36

Registered Person Being Named a Customer's Beneficiary or Holding a Position of Trust for a Customer

FINRA Requests Comment on a Proposed Rule to Limit a Registered Person from Being Named a Customer's Beneficiary or Holding a Position of Trust for or on Behalf of a Customer

Comment Period Expires: January 10, 2020

Summary

Investment professionals often develop close and trusted relationships with their customers, which in some instances have resulted in the investment professional being named the customer's beneficiary, executor or trustee, or holding a power of attorney or a similar position for the customer. Being a customer's beneficiary or holding a position of trust may present significant conflicts of interest, and FINRA has previously taken steps to address misconduct in this area.

To further address potential conflicts of interest, FINRA is proposing a new rule to limit any associated person of a member firm who is registered with FINRA (each a "registered person") from being named a beneficiary, executor or trustee, or to have a power of attorney or similar position of trust for or on behalf of a customer. The proposed rule would protect investors by requiring all member firms to affirmatively address registered persons being named beneficiaries or holding positions of trusts for customers. The proposed rule would require the member firm with which the registered person is associated, upon receiving written notice from the registered person, to review and approve the registered person assuming such status or acting in such capacity. The proposed rule would not apply where the customer is a member of the registered person's "immediate family."[1]

November 11, 2019

Notice Type

- Request for Comment

Suggested Routing

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

Key Topics

- Beneficiaries
- Conflicts of Interest
- Customer Accounts
- Positions of Trust
- Senior and Vulnerable Adult Investors

Referenced Rules

- FINRA Rule 2010
- FINRA Rule 2150
- FINRA Rule 2165
- FINRA Rule 3240
- FINRA Rule 3241
- FINRA Rule 3270
- FINRA Rule 4530

Recognizing that a registered person and customer may have a close and longstanding friendship or relationship that may be akin to, but not actually, a familial relationship, the proposed rule would not prohibit a registered person being named a beneficiary of or receiving a bequest from a customer's estate. However, given the potential conflicts of interest, FINRA would expect a member firm to employ heightened scrutiny in assessing a registered person's request to be named a beneficiary of or receive a bequest from a customer's estate. Approval should be given only when the member firm has made a reasonable determination that the registered person assuming such status does not present a risk of financial exploitation that the proposed rule is designed to address.

If the proposed rule is approved, FINRA would assess registered persons' and firms' conduct pursuant to the rule to determine the effectiveness of the rule in addressing potential conflicts of interest and evaluate whether additional rulemaking or other action is appropriate.

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; or
- Jeanette Wingler, Associate General Counsel, OGC, at (202) 728-8013.

Questions concerning the Economic Impact Assessment in this *Notice* should be directed to:

- Lori Walsh, Deputy Chief Economist, Office of the Chief Economist (OCE), at (202) 728-8323; or
- Dror Y. Kenett, Economist, OCE, at (202) 728-8208.

Action Requested

FINRA encourages all interested parties to comment on the proposal. Comments must be received by January 10, 2020.

Comments must be submitted through one of the following methods:

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

  Jennifer Piorko Mitchell
  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.[2]

Before becoming effective, a proposed rule change must be filed with the Securities and Exchange Commission (SEC) pursuant to Section 19(b) of the Securities Exchange Act of 1934 (SEA).[3]

Background & Discussion

Being named a customer's beneficiary, executor or trustee, or holding a power of attorney or a similar position for or on behalf of a customer may present significant conflicts of interest for investment professionals. Conflicts of interest can take many forms and can result in registered persons taking advantage of being named beneficiaries or holding positions of trust for personal monetary gain. Problematic arrangements may not become known to the member firm or customer's beneficiaries or surviving family members for years. Senior investors who are isolated or suffering from cognitive decline are particularly vulnerable to harm.[4]

Many, but not all, member firms address these potential conflicts by prohibiting or imposing limitations on being named as a beneficiary or to a position of trust when there is not a familial relationship.[5] Nonetheless, FINRA has observed situations where registered representatives have tried to circumvent firm policies, such as resigning as a customer's registered representative, transferring the customer to another registered representative, or having the customer name the registered representative's spouse or child as the customer's beneficiary.[6]

FINRA has taken steps to address misconduct in this area, including:

- identifying effective practices for member firms;[7]
- listing as an examination priority member firms' supervision of accounts where a registered representative is named a beneficiary, executor or trustee, or holds a power of attorney or a similar position for or on behalf of a customer who is not a family member;[8]
- reviewing customer complaints received directly by FINRA and those reported by member firms pursuant to FINRA Rule 4530 (Reporting Requirements) or Form U4 (Uniform Application for Securities Industry Registration or Transfer);
- reviewing regulatory filings made by firms on Form U5 (Uniform Termination Notice for Securities Industry Registration related to terminations for cause) disclosing related issues;

- reviewing matters referred by an arbitrator to FINRA for disciplinary investigation; and
- depending on the facts and circumstances of the conduct as issue, bringing actions for violations of FINRA rules, such as 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), 3240 (Borrowing From or Lending to Customers) or 3270 (Outside Business Activities of Registered Persons).[9]

Proposal

To further address potential conflicts of interest in this area, FINRA proposes adopting new Rule 3241 (Registered Person Being Named a Customer's Beneficiary or Holding a Position of Trust for a Customer) providing that a registered person must decline:

1. being named a beneficiary of a customer's estate[10] or receiving a bequest from a customer's estate upon learning of such status unless the registered person provides written notice upon learning of such status and receives written approval from the member firm prior to being named a beneficiary of a customer's estate or receiving a bequest from a customer's estate; and
2. being named as an executor or trustee or holding a power of attorney or similar position for or on behalf of a customer unless:
   a. the registered person provides written notice upon learning of such status and receives written approval from the member firm prior to acting in such capacity or receiving any fees, assets or other benefit in relation to acting in such capacity; and
   b. the registered person does not derive financial gain from acting in such capacity other than from fees or other charges that are reasonable and customary for acting in such capacity.[11]

The proposed rule would not apply where the customer is a member of the registered person's immediate family.[12] If the proposed rule is approved, FINRA would assess registered persons' and firms' conduct pursuant to the rule to determine the effectiveness of the rule in addressing potential conflicts of interest and evaluate whether additional rulemaking or other action is appropriate.

Knowledge

A registered person being named as a beneficiary or to a position of trust without his or her knowledge would not violate the proposed rule; however, the registered person must act consistent with the proposed rule upon learning that he or she was named as a beneficiary or to a position of trust. The proposed rule would apply when the registered person learns of his or her status as a customer's beneficiary or a position of trust for or on behalf of a customer. A registered person may decline being named as a beneficiary or to a position of trust and decline receipt of any assets or other benefit from the customer's estate so as not to violate the proposed rule.

Firm Notice and Approval

The proposed rule would permit a member firm to specify the required form of written notice for its registered persons. Upon receipt of the written notice, the proposed rule would require the member firm to:

1. perform a reasonable assessment of the risks created by the registered person's assuming such status or acting in such capacity, including an evaluation of whether it will interfere with or otherwise compromise the registered person's responsibilities to the customer; and
2. make a reasonable determination of whether to approve the registered person's assuming such status or acting in such capacity, to approve it subject to specific conditions or limitations, or to disapprove it.[13]

If the member firm imposes conditions or limitations on its approval, the firm would be required to reasonably supervise the registered person's compliance with the conditions or limitations.[14]

The proposed rule would require a member firm to establish and maintain written procedures to comply with the rule's requirements.[15] The proposed rule would also require member firms to preserve the written notice and approval for at least three years after the date that the beneficiary status or position of trust has terminated or the bequest received or for at least three years, whichever is earlier, after the registered person's association with the firm has terminated, which is similar to the requirement in Rule 3240.[16]

Reasonable Assessment and Determination

FINRA expects that a member firm's assessment would take into consideration several factors, such as:

- any potential conflicts of interest in the registered person being named a beneficiary or holding the position of trust;
- the length and type of relationship between the customer and registered person;
- the customer's age;
- the size of any bequest relative to the size of a customer's estate;
- whether, based on the facts and circumstances observed in the member's business relationship with the customer, the customer has a mental or physical impairment that renders the individual unable to protect his or her own interests;
- any indicia of improper activity or conduct with respect to the customer or the customer's account (*e.g.*, excessive trading); and
- any indicia of customer vulnerability or undue influence of the registered person over the customer.

For example, a representative's request to hold a position of trust for an elderly customer who had no relationship with the representative prior to the initiation of the broker-customer relationship is likely to present different risks than a representative's request to hold a position of trust for a longstanding friend. FINRA would not expect a registered person's assertion that a customer has no viable alternative person to be named a beneficiary or to serve in a position of trust to be dispositive to the member firm's assessment.

The proposed rule would not prohibit a registered person being named a beneficiary of or receiving a bequest from a customer's estate. However, given the potential conflicts of interest, under the rule a member firm would need to carefully assess a registered person's request to be named a beneficiary of or receive a bequest from a customer's estate, and reasonably determine that the registered person assuming such status does not present a risk of financial exploitation that the proposed rule is designed to address (*e.g.*, a registered person receiving a bequest from a customer who has been a godparent since childhood or a customer who has been a friend since childhood).

If possible, a firm should consider discussing the potential beneficiary status or position of trust with the customer as part of its reasonable determination of whether to approve the registered person assuming the status or acting in the capacity.

Scope of Proposed Rule

To address attempted circumvention of the restrictions (*e.g.*, by closing or transferring a customer's account), the proposed rule would define "customer" to include any customer that has, or in the previous six months had, a securities account assigned to the registered person at any member firm.[17] In addition, a registered person instructing or asking a customer to name another person to be a beneficiary of the customer's estate or to receive a bequest from the customer's estate would present similar conflict of interest concerns as the registered person being so named. Accordingly, the proposed rule would not allow a registered person to instruct or ask a customer to name another person, such as the registered person's spouse or child, to be a beneficiary of the customer's estate or to receive a bequest from the customer's estate.[18]

Beneficiary Status and Positions of Trust Prior to Association with Member Firm

Registered representatives move with some frequency between member firms. If a registered person was named as a beneficiary or to a position of trust prior to the registered person's association with the member, the proposed rule would require the registered person, within 30 calendar days of becoming so associated, to provide notice to and receive approval from the member consistent with the rule to maintain the beneficiary status or position of trust.[19]

Pre-Existing Beneficiary Status and Positions of Trust

Conflict of interest concerns are also raised by beneficiary status and positions of trust that were entered into prior to the existence of a broker-customer relationship, such as where the customer was not a customer of the registered person at the time at which the registered person was named beneficiary or to a position of trust. Therefore, the proposed rule would require the registered person and member firm to act consistent with the rule for any existing beneficiary status or position of trust prior to the initiation of the broker-customer relationship.[20] Comment is specifically requested on whether these prior relationships involve similar concerns for broker-dealers and their customers.

Economic Impact Assessment

FINRA has undertaken an economic impact assessment, as set forth below, to further analyze the regulatory need for the proposed rule change, its potential economic impacts, including anticipated costs, benefits, and distributional and competitive effects, relative to the current baseline, and the alternatives FINRA considered in assessing how best to meet its regulatory objective.

Regulatory Need

FINRA is active in its efforts in protecting senior and financially vulnerable investors from exploitation. In the context of these efforts, and with evidence of a growing trend of such exploitation,[21] FINRA has recognized the potential conflict of interests that can arise from having a customer name their registered representative as a beneficiary or to a position of trust. To mitigate such conflicts of interest, as well as any potential resulting harm, FINRA is proposing adoption of FINRA Rule 3241.

Economic Baseline

The economic baseline for the proposed rule is based on the existing firm policies and practices on beneficiary status and positions of trust, as well as the prevalence of registered persons being named in such capacity. To gauge the extent of both, FINRA has sought information with regard to current practices from a sample of member firms and trade associations. Specifically, FINRA sought information on current practices from firms represented on FINRA advisory committees and engaged trade associations in conversations. Information obtained indicates that the majority of firms have existing policies in place with respect to registered persons being named beneficiaries or to positions of trust.

Almost all firms in FINRA's survey indicated that they currently do not permit a registered person to be named a beneficiary for a customer who is not a family member, with some variations on how family relationship is defined. Unlike the case of being named a beneficiary, firms are more likely to allow registered persons to be named as beneficiaries or to positions of trust, in compliance with the firm's internal processes and procedures.

Registered persons are typically required to request approval to be named as a beneficiary or to a position of trust. Approval is usually requested through the outside business activities (OBA) submission process. Monitoring of compliance with the procedures is conducted through the member firms' various control functions including, for example, branch exams, annual questionnaire responses, and supervisory review of emails. FINRA understands, based on anecdotal information collected from FINRA's survey, that over the past five years more than 85 percent of such requests by registered persons have been on behalf of immediate family members.

Economic Impacts

FINRA believes that the economic impacts of the proposed rule would result in minimal costs to member firms, while benefiting the investor community by providing additional investor protections where such policies do not currently exist, are not consistently applied or are less restrictive than the proposed changes.

The proposed rule will ultimately benefit the investor community, and promote greater trust in the brokerage industry, by reducing the potential exploitation of financially vulnerable investors. FINRA believes that establishing an industry-wide benchmark for situations in which registered persons request to be named beneficiaries or to positions of trust mitigate potential conflicts of interest consistently across the industry for all customers.

As discussed above, the majority of member firms in FINRA's sample survey indicated that they have policies in place to prohibit in most cases a registered person from being named a beneficiary of a customer who is not a family member, but may permit a registered person to be named as an executor or trustee or hold a power of attorney, depending on the facts and circumstances. Anecdotal information collected by FINRA indicates that the majority of member firms in the sample survey have in place both specific policies and procedures to manage such requests, as well as mechanisms to monitor compliance. FINRA believes that where member firms already have these types of policies and procedures in place, the cost should be minimal.

Member firms with different policies and procedures, whether more or less restrictive than proposed here, would likely incur costs to amend them. Those firms required to establish a higher standard for these activities may also incur new on-going supervisory costs. The same would be true for those member firms with no current policies or procedures covering these situations. Member firms with existing practices that are more restrictive than the proposed rule could maintain those policies. However, member firms altering their current policies and procedures to be in alignment with the proposal are expected to incur one-time costs to do so. Member firms will also incur some costs to provide training on the new requirements for registered persons.

FINRA recognizes that the proposal can result in a diminishing of customer choice in identifying a person to serve in a capacity of trust. There may be circumstances where the registered person represents a better alternative to the customer than other available options. Despite the potential loss of an appropriate person to serve in a capacity of trust, FINRA believes that this cost is justified by the protections afforded to investors by significantly mitigating the particular conflict of interest.

FINRA recognizes that investment advisers, as well as other financial services professionals under different regulatory oversight, potentially have similar conflicts of interest with their customers when engaged in these activities. This is the case because the conflict of interest is not unique to the brokerage industry. Rather, the conflict arises from the pecuniary benefits that may accrue because of the nature of the relationship between the customer and the financial professional. However, there is no available information or data to permit FINRA to gauge the prevalence and impact of such relationships between these other financial professionals and their customers. Further, it is difficult to gauge the circumstances under which differences in the regulatory treatment of this activity would impact competition.

Alternatives Considered

FINRA considered various alternatives to the provisions in the proposed rule. One alternative considered was prohibiting a registered person from inducing a customer to name the registered person as a beneficiary of the customer's estate. FINRA believes that the current proposal is a better approach for addressing potential conflicts of interest because of the inherent difficulty in proving inducement. Second, FINRA considered an outright prohibition of some or all positions of trust, but decided against that approach as some positions of trust, if properly known to and supervised by member firms, may benefit customers.

Request for Comment

FINRA requests comment on all aspects of the proposal. FINRA requests that commenters provide empirical data or other factual support for their comments wherever possible. FINRA specifically requests comment concerning the following questions:

1. Are there approaches other than the proposed rule that FINRA should consider?
2. Should the scope of the proposed rule be expanded to encompass other requirements?
3. What are member firms' current practices regarding a registered person being named a beneficiary or to a position of trust for or on behalf of a customer? Would the proposed rule change firms' current practices?

4. If your firm currently has procedures regarding a registered person being named a beneficiary or to a position of trust for or on behalf of a customer, on an annual basis, how many requests are made by registered persons to be named beneficiaries or to positions of trust for a: (i) non-immediate family member; or (ii) for an immediate family member?
5. If your firm currently has procedures regarding a registered person being named a beneficiary or to a position of trust for or on behalf of a customer, has a registered person failed to provide notice to the firm or otherwise comply with the procedures? If so, how prevalent is the problem and how has your firm addressed the non-compliance with firm procedures?
6. Do dually-registered firms have comparable procedures for broker-dealer registered persons and investment adviser representatives regarding being named a beneficiary or to a position of trust for or on behalf of a customer?
7. Is the time period in the definition of "customer" for purposes of the proposed rule (*i.e.*, a customer who in the previous six months had a securities account assigned to the registered person) a sufficient period to mitigate potential conflicts of interest and to deter circumvention of the rule?
8. Should the proposed rule apply to beneficiary status and positions of trust that were entered into prior to the existence of a broker-customer relationship?
9. Should the proposed rule require a specific form of written notice for requesting approval by a registered person to be named a beneficiary or to a position of trust?
10. What other economic impacts, including costs and benefits, might be associated with the proposal? Who might be affected and how?
11. Would the proposal impose any other competitive impacts that FINRA has not considered?

Endnotes

1. The proposal would define the term "immediate family" to include "parents, grandparents, mother-in-law or father-in-law, spouse or domestic partner, brother or sister, brother-in-law or sister-in-law, son-in law or daughter-in-law, children, grandchildren, cousin, aunt or uncle, or niece or nephew, and any other person whom the registered person financially supports, directly or indirectly, to a material extent. The term includes step and adoptive relationships." *See* proposed Rule 3241(c).
2. 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.
3. *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.
4. *See, e.g.*, SEC Office of the Investor Advocate, Elder Financial Exploitation White Paper (June 2018) and International Organization of Securities Commissions (IOSCO) Senior Investor Vulnerability Final Report (March 2018) (noting that senior investors are more vulnerable to financial exploitation due to social isolation, cognitive decline and other factors).
5. *See* Report on the FINRA Securities Helpline for Seniors (December 2015) and Report on FINRA Examination Findings (December 2018) (both discussing member firm policies observed by FINRA staff).
6. *Id.*
7. *Id.*
8. *See* 2018 Regulatory and Examination Priorities Letter (January 2018) and 2019 Risk Monitoring and Examination Priorities Letter (January 2019).
9. *See, e.g.*, *Robert Torcivia*, Letter of Acceptance, Waiver and Consent, Case ID 2015044686701 (September 26, 2018) (finding, under the facts of the case, that the registered representative violated FINRA Rule 2010 in relation to accepting beneficiary designations and holding powers of attorney for senior customers and failing to inform the member firm of these positions).
10. For purposes of the proposed rule, a customer's estate would include any cash and securities, real estate, insurance, trusts, annuities, business interests and other assets that the customer owns or has an interest in at the time of death. See proposed Supplementary Material .02 to Rule 3241. The proposed scope is consistent with includable property in a decedent's gross estate for federal tax purposes. *See, e.g.*, IRS FAQs on Estate Taxes.
11. *See* proposed Rule 3241(a).
12. The proposed rule also would not affect the applicability of other rules (*e.g.*, FINRA Rule 2150).
13. *See* proposed Rule 3241(b).
14. *See* proposed Rule 3241(b)(3).
15. *See* proposed Rule 3241(b)(4).
16. *See* proposed Supplementary Material .03 to Rule 3241.

17. *See* proposed Supplementary Material .01 to Rule 3241. A securities account would include, for example, a brokerage account, mutual fund account or variable insurance product account. For purposes of this proposed rule, therefore, a registered person who is listed as the broker of record on a customer's account application for an account held directly at a mutual fund or variable insurance product issuer would be subject to the proposed rule's obligations (this is sometimes referred to as "check and application," "application way," or "direct application" business). However, a registered person who does not have customer accounts assigned to him or her would not be subject to the proposed rule.

18. *See* proposed Supplementary Material .06 to Rule 3241.

19. *See* proposed Supplementary Material .04 to Rule 3241.

20. *See* proposed Supplementary Material .05 to Rule 3241. The proposed rule would apply if the registered person is named a beneficiary or receives a bequest from a customer's estate after the effective date of the rule. For the non-beneficiary positions, the proposed rule would apply to positions that the registered person was named to prior to the rule becoming effective only if the initiation of the broker-customer relationship was after the effective date of the proposed rule.

21. *See, e.g.*, Consumer Financial Protection Bureau, Office of Financial Protection for Older Americans, Suspicious Activity Reports on Elder Financial Exploitation: Issues and Trends (Feb. 2019). The Report found that suspicious activity report (SAR) filings on elder financial exploitation quadrupled from 2013 to 2017, with financial institutions filing 63,500 SARs reporting elder financial abuse in 2017. The Report also states that these SAR filings likely represent only a tiny fraction of the actual 3.5 million incidents of elder financial exploitation estimated to have happened that year. As covered in the Report, financial institutions that must file SARs include banks, casinos, money services businesses, brokers or dealers, insurance companies, mutual funds, futures commissions merchants and introducing brokers in commodities, loan or finance companies, and housing government-sponsored enterprises.

Attachment A

Below is the text of the proposed rule change.

* * * * *

Text of Proposed New FINRA Rule

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3000. SUPERVISION AND RESPONSIBILITIES RELATING TO ASSOCIATED PERSONS

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3100. RESPONSIBILITIES RELATING TO ASSOCIATED PERSONS

* * * * *

3241. Registered Person Being Named a Customer's Beneficiary or Holding a Position of Trust for a Customer

(a) Obligations of the Registered Person

(1) A registered person shall decline being named a beneficiary of a customer's estate or receiving a bequest from a customer's estate upon learning of such status unless one of the following conditions is satisfied:

(A) The customer is a member of the registered person's immediate family; or

(B) The registered person provides written notice to the member with which the registered person is associated, in such form as specified by the member describing the proposed status, upon learning of such status and receives written approval from that member of such status prior to being named a beneficiary of a customer's estate or receiving a bequest from a customer's estate. If the member disapproves the status or places conditions or limitations on it, the registered person shall not assume such status or shall comply with such conditions or limitations.

(2) A registered person shall decline being named as an executor or trustee or holding a power of attorney or similar position for or on behalf of a customer unless one of the following conditions is satisfied:

(A) The customer is a member of the registered person's immediate family; or

(B) The registered person provides written notice to the member with which the registered person is associated, in such form as specified by the member describing the position and the person's proposed role, upon learning of such status and receives written approval from that member of such status prior to acting in such capacity or receiving any fees, assets or other benefit in relation to acting in such capacity; and

(i) The registered person does not derive financial gain from acting in such capacity other than from fees or other charges that are reasonable and customary for acting in such capacity; and

(ii) If the member disapproves the position or places conditions or limitations on it, the registered person shall not act in such capacity or shall comply with such conditions or limitations.

(b) Obligations of a Member Receiving Notice

(1) Upon receipt of a written notice as described in Rule 3241(a), a member shall:

(A) Perform a reasonable assessment of the risks created by the registered person's assuming such status or acting in such capacity, including an evaluation of whether it will interfere with or otherwise compromise the registered person's responsibilities to the customer; and

(B) Make a reasonable determination of whether to approve the registered person's assuming such status or acting in such capacity, to approve it subject to specific conditions or limitations, or to disapprove it.

(2) Upon completion of the member's assessment, a member shall advise the registered person in writing whether the member:

(A) Approves the person's assuming such status or acting in such capacity and imposes any conditions or limitations on the person's holding the position; or

(B) Disapproves the person's assuming such status or acting in such capacity.

(3) If the member imposes conditions or limitations on its approval of the person's assuming such status or acting in such capacity, the member shall reasonably supervise the registered person's compliance with such conditions or limitations.

(4) A member shall establish and maintain written procedures to comply with the requirements of paragraph (b) of this Rule.

(c) Definition of Immediate Family

The term "immediate family" means parents, grandparents, mother-in-law or father-in-law, spouse or domestic partner, brother or sister, brother-in-law or sister-in-law, son-in law or daughter-in-law, children, grandchildren, cousin, aunt or uncle, or niece or nephew, and any other person whom the registered person financially supports, directly or indirectly, to a material extent. The term includes step and adoptive relationships.

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

.01 Customer. For purposes of this Rule, a "customer" would include any customer that has, or in the previous six months had, a securities account assigned to the registered person at any member.

.02 Estate. For purposes of this Rule, a customer's estate would include any cash and securities, real estate, insurance, trusts, annuities, business interests and other assets that the customer owns or has an interest in at the time of death.

.03 Record Retention. For purposes of paragraph (b) of this Rule, members shall preserve the written notice and approval for at least three years after the date that the beneficiary status or position of trust has terminated or the bequest received or for at least three years, whichever is earlier, after the registered person's association with the member has terminated.

.04 Position Prior to Association With Member. If a registered person was named as a beneficiary or to a position of trust prior to the registered person's association with the member, the registered person, within 30 calendar days of becoming so associated, shall provide notice to and receive approval from the member consistent with this Rule to maintain the beneficiary status or position of trust.

.05 Pre-Existing Positions. With respect to agreements to assume such status or act in such capacity that were entered into prior to the existence of a broker-customer relationship, such as where the customer was not a customer of the registered person at the time at which the registered person was named beneficiary or to a position of trust, these agreements raise similar conflict of interest concerns as agreements to assume such status or act in such capacity entered into subsequent to the existence of a broker-customer relationship. Therefore, the registered person must act consistent with paragraph (a) of this Rule for any existing beneficiary status or position of trust prior to the initiation of the broker-customer relationship. Moreover, upon receipt of notice of such a position, the member should evaluate the beneficiary status or position of trust consistent with paragraph (b) of this Rule.

.06 Naming Other Persons. A registered person instructing or asking a customer to name another person to be a beneficiary of the customer's estate or to receive a bequest from the customer's estate would present similar conflict of interest concerns as the registered person being so named. Accordingly, a registered person instructing or asking a customer to name another person, such as the registered person's spouse or child, to be a beneficiary of the customer's estate or to receive a bequest from the customer's estate would not be consistent with paragraph (a)(1) of the Rule.

Exhibit 2b

List of Written Comments
Regulatory Notice 19-36

1. Lisa Bleier, Securities Industry and Financial Markets Association ("SIFMA") (January 10, 2020)

2. Belinda Duran ("Duran") (January 7, 2020)

3. Samuel Edwards, Public Investors Arbitration Bar Association ("PIABA") (January 10, 2020)

4. Marco Fuentes, J.W. Cole Financial, Inc. ("Cole") (November 14, 2019)

5. Christopher Gerold, North American Securities Administrators Association, Inc. ("NASAA") (January 24, 2020)

6. Thomas Holubiak, Bolton Global Capital ("Bolton") (January 2, 2020)

7. Christopher Iacovella, American Securities Association ("ASA") (January 10, 2020)

8. Bob Kaplon, Kenneth Jerome & Co., Inc. ("Kaplon") (November 14, 2019)

9. Dar'shun Kendrick, Kendrick Advisory & Advocacy Group, LLC ("Kendrick") (January 2, 2020)

10. Fitapelli & Kurta ("Fitapelli") (January 10, 2020)

11. Stephen Mack, Mack Investment Securities, Inc. ("Mack") (January 9, 2020)

12. Seth Miller, Cambridge Investment Research, Inc. ("Cambridge") (January 10, 2020)

13. Scott Silver, Silver Law Group ("Silver Law") (January 10, 2020)

14. Bill Singer ("Singer") (November 26, 2019)

15. Anonymous (November 12, 2019)

16. Robin Traxler, Financial Services Institute ("FSI") (January 10, 2020)

17. Drake Wilson and Christine Lazaro, St. John's University School of Law Securities Arbitration Clinic ("St. John's Clinic") (January 10, 2020)

Exhibit 2c

January 10, 2020

Submitted via e-mail: pubcom@finra.org
FINRA
1735 K Street, NW
Washington, DC 20006

Re: FINRA Notice 19-36

To Whom It May Concern:

Thank you for the opportunity to provide feedback on Proposed New Rule 3241. The proposed rule would limit a registered person from being named a customer's beneficiary or holding a position of trust for a customer. SIFMA appreciates the importance of this proposal in promoting trust and confidence in the securities industry and support FINRA's efforts to protect customers through the implementation of this proposed rule.,

It is important to ensure the investing public understands the purpose of the rule and the potential conflict of interest. We would recommend FINRA make available resources, similar to those designed around FINRA Rules 2165 and 4512, that member firms may share with their customers explaining the rule and reasons for additional scrutiny to promote investor confidence. Our comments below focus on areas where additional clarification could be helpful.

I. SIFMA supports the proposal to require written notice and approval when certain registered individuals are named as a beneficiary or to positions of trust subject to exceptions

We agree that a registered individual being named as his or her customer's beneficiary, trustee, power of attorney or holding other positions of trust could present potential conflicts of interest and should therefore be disclosed to the firm for review subject to certain exceptions. We agree with this approach rather than having a strict prohibition of such arrangements.

II. SIFMA supports requiring written notice and approval only for registered individuals who have a customer's securities account assigned to them

The FINRA proposal would require a registered person to decline being named a beneficiary of a customer's estate or receiving a bequest from a customer's estate unless the registered person first provides notice to and receives written approval from the member firm. As FINRA recognizes in its proposal, many of our firms currently enforce policies limiting registered persons' ability to be named in such capacities. While this proposal will ensure that all firms put in place such a policy, we agree with limiting the scope to those situations when a customer has or has had a securities account assigned to the particular registered individual and would appreciate clarification to ensure that existing firm restrictions are consistent with the proposed new rule.

For purposes of being named to a position of trust with respect to client assets, we appreciate FINRA's attempt to ensure that appropriate and common relationships, such as those of an immediate family member, are clearly exempted from the rule. We also appreciate the inclusive definition of immediate family member, which includes those individuals that registered persons financially support.

We support that this proposed rule would not apply to registered persons not involved in the handling of the account of public customers, including, but not limited to, permissively registered associated persons of the member firm. The definition of "customer" in the Supplementary Material states the customer must be "assigned" to the registered person, which would appear to exclude permissive registrants and other categories of registered persons. We believe that the grant of a beneficial interest or the designation of a registered person not involved in the handling of the accounts of public customers to a position of trust by such customers does not give rise to the same concerns as situations involving registered persons actively engaged in the handling of accounts of public customers.

Additionally, we would ask FINRA to clarify that the new rule only applies to those registered persons when it is an account they service or manage as broker of record, as opposed to any advisor named as a beneficiary to any client's account. The proposed rule states it covers a customer that has, or in the previous six months had, a securities account **assigned** to the registered person. We ask that FINRA provide clarification that the proposed rule only applies to those registered persons who are named in such a capacity and manage(d) the client's account. This would focus the proposed rule's application to the types of conflicts intended to be addressed.

III. SIFMA agrees the requirements should apply after FA's knowledge of beneficiary designation

While we appreciate that the proposed rule acknowledges that there may be situations where a registered person is unaware that they have been named as a beneficiary, we would like clarification that the registered person has a reasonable time-frame to notify the firm. The proposed rule would apply when the registered person learns of his or her status as a customer's beneficiary or appointment to a position of trust for or on behalf of a customer. Learning of the status would trigger the obligation, but then a reasonable time period would be appropriate for reporting that relationship.

IV. FINRA should provide guidance on relationships in place prior to the final rule and expectations on reviewing those existing arrangements

We ask FINRA to provide clear direction about relationships that are effective today including whether all positions and scenarios covered under the rule would be subject to review under the new standards or whether some would be considered out of scope or "grandfathered" due to existing prior to the rule. While many firms have current policies to address registered individuals in positions of trust with customers, some may not address all arrangements covered under the rule. We are concerned it will be challenging and time-consuming to conduct a full-scale retroactive review of all accounts across an organization, and would suggest FINRA provide clear guidance on which pre-existing relationships are covered and also sufficient time for compliance to allow for applicable existing accounts and arrangements to be reviewed and approved through internal supervisory and operational controls once the rule becomes effective.

V. There should be an exception for trustee relationships under the firm's business model

Once a registered person has been named either as a beneficiary or to a position of trust with a client, the Member firm needs to perform a reasonable assessment of the relationship and make a reasonable determination of whether to approve.

We would appreciate clarification from FINRA that the proposal is not intended to cover firms acting in their capacity as a trustee in their trust lines of business. Some member firms have business lines in which they intentionally take on these positions of trust. We are assuming that FINRA is focusing on individual registered persons who would be put in a position of trust in their personal capacity, not as a result of a firm authorized and approved business capacity.

VI. Conclusion

Thank you for the opportunity to comment. Please let us know if we can answer any questions.

Sincerely,

Lisa J. Bleier
Managing Director

Attn: Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington DC 20006-1505

January 7, 2020

RE: Regulatory Notice 19-36 Requested Comments on a proposed Rule to Limit a Registered Person from Being Named a Customer's Beneficiary or Holding a Position of Trust for on Behalf of a Customer

The proposed rule to limit a registered person from being named a customer's beneficiary is cause for concern, primarily because of the difficulty of implementing and enforcing this rule. Rules may be enacted; but in the real world, customers do not always disclose their beneficiary information on estate documents such as a living trust. The information within a living trust can also be changed or amended at any time by a trustee of that living trust without notifying the advisor.

A living trust is not a document that is intended to be made public. By its very nature, it is designed to be a private document; and a customer who is a trustee of their living trust maintains control over it as well as the disclosure of the contents within a living trust.

An advisor does not have control over the customer's living trust. Customers who create living trusts and are trustees of their living trusts usually believe they have the right to choose who they want to designate as their beneficiaries. Customers may also choose to withhold that information and not disclose it, for as long as the customer remains a trustee and maintains control over the living trust. Furthermore, customers may not know of this proposed rule; or the customer may have a trust that has already been created.

It is unjust to target the advisor as being someone responsible for the decisions a customer makes within the customer's living trust. The advisor has no control over this. It is also unjust to expect a broker-dealer to enforce this proposed rule, when the both broker-dealer and the advisor do not have the power to force a customer to disclose beneficiary information. However, that is exactly what this rule proposes to do.

How is Finra expecting to enforce this rule when the broker-dealer and the advisor have no control over the customer's decisions within a living trust; and neither has the power to force the client to disclose beneficiary information, which many clients consider to be private? Customers also have attorneys who may advise them that information contained within living trusts can remain private. If Finra has no clear answers to these questions, then how can Finra expect the customer, the advisor, and the broker-dealer to be subject to this proposed rule?

Belinda Duran
Advisor

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January 10, 2020

Via email to pubcom@finra.org

Ms. Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: **FINRA Regulatory Notice 2019-36** (Limiting a registered person from being a customer's beneficiary or holding a position of trust on behalf of a customer)

Dear Ms. Mitchell:

I write on behalf of the Public Investors Advocate Bar Association ("PIABA"), an international, not-for profit, voluntary bar association that consists of attorneys who represent investors in disputes with the securities industry. Since its formation in 1990, PIABA's mission has been to promote the interests of the public investor by, among other things, seeking to protect such investors from abuses in the arbitration process, seeking to make the arbitration process as just and fair as possible, and advocating for public education related to investment fraud and industry misconduct. Our members and their clients have a fundamental interest in the rules promulgated by the Financial Industry Regulatory Authority ("FINRA") that govern the practices of brokers and broker-dealer firms.

PIABA supports proposed FINRA Rule 3241 as outlined in SR-FINRA-2019-036 (hereinafter "the Notice") that addresses potential conflicts of interest created where a registered representative is named as a beneficiary, executor or trustee, or placed in a similar position of trust for a customer. The new rule requiring brokers to disclose these situations where registered persons are named beneficiaries or hold positions of trust for customers and then requiring firms to assess and approve such status would add a layer of protection to vulnerable clients and their families.

As FINRA notes, conflicts of interest frequently arise in situations where registered representatives are named as beneficiaries or hold positions of trust. Senior and cognitively impaired investors are particularly vulnerable, and problems may not become known to family members for years. PIABA members have encountered countless situations when representing investors or investors' families where a registered representative was given carte blanche authority to do with an investor's money or accounts whatever he or

she wanted. This has resulted in many situations where vulnerable investors have been victimized when a trusted advisor invests a client's money in a broker's outside business activity, uses the client's money to invest in high commission products, or, sometimes just taking the client's money. That includes tanking a client's money by becoming a beneficiary of the client's estate which is an important issue the proposed rule would address.

Requiring brokers to disclose their interests – whenever they learn of them – will inform their supervisors of such a relationship and increase the scrutiny with which those accounts are reviewed. This would also mandate that a supervising brokerage firm would have more information when supervising transactions in an account for which the firm knows the broker has a financial interest. In the event the broker does not learn of his or her beneficiary status until they actually benefit, the disclosure would then be made and then the review pertaining to the appropriateness of that beneficiary status could be made after the fact. Effectively, these proposed changes add a layer of protection to vulnerable customers and in many cases, the impacted family members.

Brokers who are honestly benefitting from a customer's account based upon a close but non-familial relationship should have no problem with this rule as it does not prohibit such a relationship, but simply calls for additional disclosure and supervision.

For these reasons, PIABA supports the increased disclosure and supervisory requirements imposed under proposed FINRA Rule 3241 where brokers find themselves in positions where they could potentially benefit from their positions as beneficiaries, trustees, etc. to non-immediate family members.

Respectfully submitted,

Samuel B. Edwards, President
Public Investors Advocate Bar Association

November 14, 2019

FINRA
Office of the Corporate Secretary
Washington DC, 20006.156

RE: Regulatory Notice 19-36 Requested Comments on a proposed Rule to Limit a Registered person from Being Named a customer's Beneficiary or Holding a Position of Trust for or on Behalf of a Customer.

Sirs:
I am generally in favor of this proposed rule. However, I believe the mechanics on the supervision of bequests must be based on WSP guidance and not results. None of my firms have required customers to provide us with a copy of their estate documents while they are alive, and if we had done so, I believe we would have had significantly fewer customers. It is not uncommon that when a customer does pass that in their estate documents they leave a portion of their estate to their financial professional. The professional will feign ignorance of any prior knowledge of the bequest. Many times this response is genuine. Hence your new rule will need to address what a firm is to do if: 1) the firm had guidance on the matter in their WSP's, 2) the guidance was reasonable, 3) the firm tested that guidance and had reasonable methods of review & 4) a customer that can honestly claim they have no knowledge of our guidance includes a financial benefit to their financial professional in their estate and never reveals this information to the firm or the financial professional while they are alive.

Customers often do not show us all of their cards. To hold a firm responsible for what it cannot require a customer to do is overzealous regulation at its worst.

Marco Fuentes
11/14/2019

Marco Fuentes
Chief Compliance Officer

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January 24, 2020

By email to: pubcom@finra.org

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street NW
Washington, DC 20006-1506

Re: Regulatory Notice 19-36: Rule to Limit a Registered Person from Being Named a Customer's Beneficiary or Holding a Position of Trust for a Customer

Dear Ms. Mitchell:

I am writing on behalf of the North American Securities Administrators Association, Inc. ("NASAA")[1] in response to the request for comment by the Financial Industry Regulatory Authority ("FINRA") on *Regulatory Notice 19-36: Registered Person Being Named a Customer's Beneficiary or Holding a Position of Trust for a Customer* (the "Request for Comment").[2] Addressing the conflicts of interests that occur when a registered person is named as a beneficiary or is holding a position of trust[3] for a customer is an important step in advancing investor protection. NASAA commends FINRA for its engagement and efforts on issues related to protections for senior investors – an area in which FINRA and NASAA have been able to collaborate successfully.

As proposed, Rule 3241 would allow a registered person to be named a beneficiary or hold a position of trust for a customer where the customer is an immediate family member or when the registered person's firm provides written approval.[4] It is NASAA's position however, that a

[1] Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA's membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

[2] *See* Regulatory Notice 19-36: Registered Person Being Named a Customer's Beneficiary or Holding a Position of Trust for a Customer, FINRA (November 11, 2019) *available at* https://www.finra.org/rules-guidance/notices/19-36.

[3] For the purposes of this response, the term "position of trust" is defined as including but not limited to receiving a bequest; acting as power of attorney, trustee, and/or executor; or holding any other position of power or control over a customer's financial affairs.

[4] NASAA, like FINRA, recognizes that there are differences in the duties and obligations that arise when a person is designated as a beneficiary versus being named to a position of trust. But serving in either of these

registered person should be prohibited from being named as a beneficiary or appointed to a position of trust by a customer unless the customer is an immediate family member. This prohibition should also apply to family members of the registered person and entities controlled by the registered person.[5] Further, even if the rule were limited to immediate family members, the registered person should be required to seek prior written authorization from the member firm and the firm should be required to implement heightened supervision of the accounts.

Alternatively, if FINRA is inclined to move forward with allowing registered persons to be named as beneficiaries or serve in positions of trust for customers beyond their immediate family members, FINRA should, at a minimum, require the member firm to implement heightened supervision of these accounts. Furthermore, the definition of immediate family members should be narrowed, and FINRA should explicitly state that member firms may choose to limit or prohibit registered persons to be named as a beneficiary or serve in positions of trust.

Justification for the above positions are more fully explained below in response to the specific questions raised by FINRA in the Request for Comment. As such, NASAA encourages FINRA to revise the rule as set forth above.

Responses to Certain Questions in the Request for Comment

Question 1. Are there approaches other than the proposed rule that FINRA should consider?

Yes. FINRA should revise the rule to prohibit registered persons being named as a beneficiary or holding a position of trust for a customer unless they are an immediate family member. Further, the registered person should be required to seek prior written authorization from the member firm and the firm should be required to implement heightened supervision of the accounts. This approach is more consistent with other self-regulatory organizations in North America and aligns with policies and procedures currently in place at some FINRA member firms.[6]

In Canada, the Investment Industry Regulatory Organization of Canada (IIROC) and the Mutual Fund Dealers Association (MFDA)[7] limit the instances when a registered person may act in a position of trust for a customer and mandate that protective measures be implemented when registered persons assume these roles. IIROC amended its dealer member rules concerning

capacities creates potential conflicts of interest. Therefore, it is NASAA's position that the methods of addressing them should be the same.

5 The prohibitions recommended in this letter for registered persons should also apply to immediate family members of the registered person and entities controlled by the registered person. This approach would prevent registered persons from attempting to circumvent the prohibitions that would otherwise be applicable to them.

6 *See* FINRA Regulatory Notice 19-36, page 3 noting that "Many, but not all, member firms address these potential conflicts by prohibiting or imposing limitations on being named as a beneficiary or to a position of trust when there is not a familial relationship."

7 IIROC is the national self-regulatory organization which oversees all investment dealers and trading activity on debt and equity marketplaces in Canada. The MFDA is a national self-regulatory organization for the distribution side of the Canadian mutual fund industry.

personal financial dealings and outside business activities in 2017. As amended, the rules prohibit approved persons of a dealer member from directly or indirectly engaging in any personal financial dealings with customers. Under the rules there is a prohibition on acting as a power of attorney, trustee, executor, or otherwise having full or partial control or authority over the financial affairs of a customer,[8] unless the customer is a related person under the *Income Tax Act* (Canada).[9] The prohibition is premised on the fact that that these are personal financial dealings and any personal financial dealings with customers creates an unacceptable conflict of interest between the dealer member employee and the customer. The rules further provide that when an approved person is appointed by a family member, they must receive prior approval from the dealer member.

Similarly, the MFDA amended its rules in 2017 to prohibit a member or approved person from having full or partial control or authority over the financial affairs of a customer, unless the customer was a related person as defined by the *Income Tax Act* (Canada).[10] This includes accepting or acting upon a power of attorney from a customer, accepting an appointment to act as a trustee or executor of a customer, or acting as a trustee or executor in respect of the estate of a customer. The MFDA also mandates that an approved person notify the member of an appointment and obtain written member approval prior to accepting or acting upon the control or authority.

A rule limiting registered persons being named as a beneficiary or holding a position of trust to immediate family members only, with prior member firm authorization and heightened supervision of the accounts, would provide the investor protections necessary to address the conflicts of interest identified in the Request for Comment.

Question 2. Should the scope of the proposed rule be expanded to encompass other requirements?

Yes. The scope of the proposed rule should be expanded to address the prohibitions and requirements discussed below.

A. Prior Authorization from the Member Firm

If the rule permits a registered person to be named a beneficiary or to act in a position of trust for a customer, regardless of whether the customer is an immediate family member or not, the rule should require that in all circumstances the registered person seek prior written approval from the member firm. The rule should also provide guidance to the member firm regarding the information that should be reviewed before approving such requests. At a minimum the registered

8 In the Canadian context the "registered individuals" acting as a dealing representative or an advising representative would deal with or advise clients.

9 IIROC Rule 42 on general Conflicts of Interest would likely, in most instances, prevent an IIROC member from being permitted to be named a beneficiary from a client. Most IIROC member firms would have policies and procedures prohibiting such appointment due to the inherent conflict, however there may be circumstances that warrant an exception in firm policies and procedures.

10 MFDA Rule 2.1.4 would suggest being named a beneficiary from a client would create an unacceptable conflict of interest.

person should be required to disclose:

- relevant information about the customer, including the length of time the registered person has known the customer;
- the nature of any special or familiar relationship between the registered person and the customer;
- the circumstances precipitating any appointment or designation, or any information that might make the customer vulnerable; and
- identification of the role(s) in which the registered person is being appointed.

In addition, the rule should provide guidance to the member firm when reviewing the written requests, and require that the process of the approval be documented to include:

- the steps that the member firm undertook to assess the risk prior to the registered person being approved;
- the steps that the member firm will take to minimize the conflict of interest;
- how the member firm communicated to the customer the risk created by the appointment so that the customer appreciates the risk; and
- an outline of the supervisory measures that will be taken by the member firm.

B. Heightened Scrutiny of Approved Accounts

As written, the rule does not require member firm approval for family members and only requires member firms to "reasonably supervise" the registered person's compliance with conditions or limitations placed on the account. This rule is insufficient as there are inherent conflicts of interest present even where the customer is an immediate family member of the registered person. The member firm must closely monitor the account even where formal conditions are not imposed by the firm. For instance, firms could treat these relationships like heightened supervision situations and place additional review on trades and transactions in the account and withdrawals from the account to make sure the registered person is making suitable recommendations and not taking advantage of the position of trust.

Heightened supervision of any related accounts is appropriate as a guard against abuse of the power and trust that come with these relationships, including where the registered person and customer have a familial relationship. The National Council on Aging reports that in almost 60% of elder abuse and neglect incidents, the perpetrator is a family member with two-thirds of the perpetrators being adult children or spouses.[11]

In the circumstances where a senior investor has become isolated from family or friends, a registered person may think it is appropriate to step in to fill the gap. While these relationships can start with good intentions, they have the potential to become exploitative situations. In more malevolent cases, a registered person may "groom" a customer with the goal of exploitation. To

[11] *See* https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/

illustrate this reality, attached as Appendix "A"[12], is a state sentencing memorandum from a case where a registered representative from Maine stole millions of dollars from his widowed senior customer and her disabled adult son. He was able to perpetrate this abuse and to gain positions of trust by exploiting a long-standing personal relationship (albeit not as an immediate family member).

Additionally, responsible registered persons should be familiar with resources available to customers who may be isolated or estranged from family and friends. Registered persons should become aware and be knowledgeable of the existing network of resources available to assist customers such as the local adult protective services, non-governmental organizations that specialize in providing services and support for the elderly, local bar associations and legal aid services, and similar agencies that may be able to assist when a customer is unable to turn to friends or family to assist with financial affairs.

C. Modification of Account Applications to Assure Customer Awareness

FINRA should require member firms to advise customers in the account application of the restrictions applicable to naming a registered person, an immediate family member of the registered person, or an entity controlled by the registered person as a beneficiary or to a similar position of trust for the customer. While a registered person has no control as to who a customer ultimately designates when the customer does not consult the member firm or representative, such communication at account opening would ensure customers are fully aware of the potential problems and conflicts created when designating their broker as beneficiary or appointing them to serve in a position of trust. In addition, the member firm should ask customers about existing executor, trustee, and power of attorney arrangements, and similar positions of trust, and whether the customer named the registered person as a beneficiary. The member firm should ask this during account opening and periodically thereafter. Such an inquiry could be included in regular customer profile updates.

D. Interview Customers Outside the Presence of the Registered Person

To the extent practicable, when reviewing a request to approve a registered person to be named as a beneficiary or to act in a position of trust, member firms should be required to interview the customer outside the presence of the registered person. This should be a practice in all instances, whether the registered person is assuming the role for a non-family member or a family member. This practice will ensure that the request to appoint the registered person is well informed and has not been coerced. Where it is not possible to interview the customer, the member firm should be required, at the very least, to verify that the customer indeed directed the appointment of their own volition and did not feel pressure by the registered person to appoint the registered person to the position of trust.

[12] This memorandum was also appended to NASAA's comment letter in response to FINRA Regulatory Notice 19-27.

E. Any Member Firm May Adopt Policies to Prohibit Members from These Roles

It should be made clear that any member may adopt policies and procedures that prohibit their members from acting in these roles for non-family members, even if the FINRA rule permits the registered person to be named a beneficiary or to act in a position of trust for a customer.

F. The Definition of "Immediate Family Member" Should be Narrowed

FINRA should revise and narrow the definition of "immediate family member" to prevent abuse of the following language: "any other person who the registered person financially supports, directly or indirectly, to a material extent." NASAA recommends that FINRA require that any such person "who the registered person financially supports" must reside in the same household as the registered person.

G. The Prohibition Should Apply Where the Registered Person is Unaware of the Appointment

NASAA would support a rule that prohibits registered persons from being named a beneficiary or to act in a position of trust for a customer even in situations where a registered person is named without his or her knowledge. NASAA does not, however, object to a rule that would permit registered persons to be named beneficiaries of family-member customers where the registered person was unaware of the designation.

In the case where a registered person is aware of the intent of a non-related customer to appoint them to a position of trust, the registered person should decline such designation. Where the registered person becomes aware of the appointment after the customer is incapacitated or has passed away, the registered person should decline the appointment in favor of an alternate person. If there is no alternate person immediately available to assume the position, the rule should permit the registered person who has been named to the position of trust to accept the appointment on an interim basis if the customer's account is temporarily transferred to a different registered person while the original registered person on the account obtains a replacement to serve in that position. Obtaining a replacement may require the registered person to seek the assistance of the court or local adult protective services agency. In situations where there is no one else to be placed in the position of trust or when the registered person would be authorized to act in a position of trust, the member firm should be required to permanently assign the customer account to another representative.

Registered persons who were previously named to positions of trust prior to the implementation of this rule should be required to take steps to unwind these relationships, to the extent possible.

In the case where a registered person is aware of the intent of a non-related customer designating them as a beneficiary or appointing them to a position of trust, the registered person should decline such designation. Where the registered person becomes aware of being designated

beneficiary by a customer only after the death of the customer the registered person should be required to immediately report the designation to their member firm who can determine whether there is a conflict of interest and how to properly manage the conflict of interest. Member firms should have written supervisory procedures addressing how the firm will handle these situations and address all conflicts of interest.

H. Prohibit the Registered Person, Their Immediate Family, and Controlled Entities From These Roles

The rule should prohibit the registered person's immediate family members and entities controlled by the registered person from being named beneficiary or to act in a similar position of trust for the registered person's customer. While Supplementary Material .06 states that the registered person instructing the customer to name another person to be named a beneficiary or receive a bequest is inconsistent with the rule, it does not go far enough. NASAA notes that in many cases the practice of allowing representatives to act in these capacities is already prohibited by member firms. In some cases, because the practice is prohibited by the member firm, the registered person may have an immediate family member, or an entity controlled by the registered person to be named while the registered person continues to direct the customer's affairs.

Question 7. Is the time period in the definition of "customer" for purposes of the proposed rule (i.e., a customer who in the previous six months had a securities account assigned to the registered person) a sufficient period to mitigate potential conflicts of interest and to deter circumvention of the rule?

A lookback period of 12 months is more appropriate than the 6-month period proposed in the rule as the longer look back period would help prevent circumvention of the rule.

Question 8. Should the proposed rule apply to beneficiary status and positions of trust that were entered into prior to the existence of a broker-customer relationship?

The rule should include language applicable to pre-existing positions. Supplementary Material .05 discusses pre-existing positions; however, including language in the rule is the appropriate way to address this important circumstance. The conflicts noted above are no less significant or concerning because the position of trust was established prior to the brokerage relationship.

NASAA is of the view that anytime a registered person is to be named as a beneficiary or to act in a position of trust by a customer, the relationship should be screened. There should not be a "grandfathering" clause for pre-existing positions. Ultimate concern should be for customers' well-being and ensuring that conflicts of interest are avoided. Moreover, member firms should ask about the existence of such relationships during the hiring process so that the relationship can be screened before the individual is hired.

Question 9. Should the proposed rule require a specific form of written notice for requesting approval by a registered person to be named a beneficiary or to a position of trust?

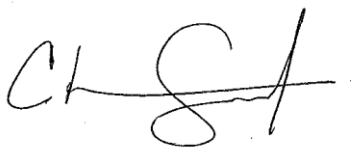
NASAA supports requiring a specific form of written notice for requesting approval. However, absent a specific form, guidance should be provided regarding the information the registered person should provide the member firm as discussed above.

Conclusion

NASAA supports FINRA's ongoing efforts to protect senior investors and appreciates the opportunity to comment. It is NASAA's position that FINRA can take further steps to assure appropriate protections are in place to address the conflicts of interest presented by a registered person being named a beneficiary of a customer, or to hold a position of trust for a customer.

If you have questions about these comments, please contact Joseph Brady, NASAA's Executive Director.

Sincerely,



Christopher Gerold
NASAA President
Chief, New Jersey Bureau of Securities

Appendix A

STATE OF MAINE
PENOBSCOT, ss

UNIFIED CRIMINAL DOCKET
DOCKET NO. CR-17-707

STATE OF MAINE

V.

ROBERT KENNETH LINDELL JR.
(AKA R. KENNETH LINDELL OR R. KENNETH LINDELL JR.

STATE'S SENTENCING MEMO

NOW COMES the State of Maine, by and through Assistant Attorney General Gregg D. Bernstein, and respectfully sets forth the State's sentencing recommendation of twenty-two (22) years with all but fifteen (15) years suspended, five years of probation, and $2,919,398 in restitution (for the benefit of the victims named in the Indictment).

The State's recommendation is based upon: the ages and physical and mental health of the three primary victims; the complexity and the value of the theft and fraud; Mr. Lindell's abuse of his positions of trust and authority; his past brokerage disciplinary history; other unrelated but similar fraud; failure to accept responsibility; and, what the evidence showed were multiple false statements he made during his testimony.

INTRODUCTION

After a jury trial Robert K. Lindell, a former State of Maine legislator and licensed Maine securities broker-dealer agent from coastal Maine, was convicted of theft, securities fraud, income tax evasion, and related income tax crimes—as a result of bilking two elderly widow clients, a disabled war veteran, related family members, and other beneficiaries out of cash and securities. Mr. Lindell accomplished this through the abuse of trust and authority placed in him to manage personal client securities and finances, along with the contents of an estate and two trusts through his role as a co-Personal Representative ("co-PR") of an estate and as trustee of two trusts.

Mr. Lindell engaged in the theft of more than $3.5 million dollars in his multi-year scheme. He used the money he stole to fund an extravagant lifestyle, which included expensive travel around this country and Europe, fine dining, shopping sprees, and the cash purchase and extensive renovation of a home in northern California wine country (which he then used to further enrich himself by taking out a $450,000 loan, using the home as collateral). See Exhibit 1, which sets forth the totality of Mr. Lindell's thefts from all sources.

Mr. Lindell's conduct highlights the risk that elderly, isolated, impaired, and trusting clients—and their families and heirs—find themselves in when confronted by an individual who will go to great lengths to engage in what the evidence at trial showed was a parasitic scheme of theft and fraud. Moreover, the trial evidence and materials discussed in this memorandum show Mr. Lindell's past is filled with additional similar conduct. Further, the trial evidence shows he testified falsely and blamed everyone but himself. All of these facts support the State's sentencing recommendation.

PROCEDURAL AND FACTUAL BACKGROUND

On March 1, 2017, Mr. Lindell was charged in a two count Indictment with one count of theft and one count of securities fraud. On July 26, 2017, the State obtained a three count Superseding Indictment, which added an additional theft count. On April 25, 2018, the State obtained a Second Superseding Indictment consisting of the same three counts plus additional income tax related counts. Jury selection took place on October 29, 2018. Trial began on October 30, 2018 and continued through November 7, 2018. The jury returned verdicts of guilty on all counts, as charged.

Trial Evidence

Mr. Lindell was a Maine licensed securities broker-dealer agent who resided and worked in Penobscot and Waldo Counties. He was very experienced in the insurance and securities industries. He had two long-time clients from whom he stole money and securities. Both were elderly widows: Phyllis Poor (of Belfast, Maine) and Gianna Lewis (of France). He also stole from Ms. Poor's disabled son, a Vietnam War veteran, Frederic J. Poor ("Frederic"), as well as assets set aside for his care.

a. Phyllis Poor

In or around the late 1990s or 2000 Phyllis Poor became one of Mr. Lindell's brokerage clients. Not long after she became a client Mr. Lindell engaged in grooming practices in an effort to obtain Ms. Poor's trust and access to her financial assets and estate planning affairs. As a licensed securities broker-dealer agent (and likely assisted by the cloak of being a Rotary member and state legislator), Mr. Lindell used predatory tactics to insert himself into Ms. Poor's personal and daily life in order to gain her trust. She was not close with her adult children, her husband had died in 1998, and she lived alone in rural Maine. He knew this and took advantage of this opportunity.

Mr. Lindell succeeded in getting Ms. Poor to place her faith and confidence in him, cultivating his relationship with her as much as possible. Beginning in the early 2000s he began meeting with Ms. Poor virtually every Wednesday at her home in Belfast (right after his weekly Rotary meetings). They had tea or lunch together at Ms. Poor's dining room table and discussed her securities and finances. Ms. Poor's wealth consisted of careful investments and her prudent management of her cash and securities. She did not outwardly appear like a millionaire, and lived a modest lifestyle. With direct access to Ms. Poor's securities and

finances and the careful attention he paid to her, however, Mr. Lindell learned the details of her investment habits and wealth.

In August 2004, Mr. Lindell drove Ms. Poor (84 years old at the time) to an attorney's office at which Ms. Poor executed a power of attorney ("POA") and a trust document (both on the same date). In the POA Ms. Poor granted Mr. Lindell and her longtime friend, Barbara Gray, co-POA responsibilities. Ms. Gray testified at trial that she never exercised any authority under the POA and was not certain that she even knew of its existence. As for the trust, it was entitled the "Frederic J. Poor Trust" ("2004 FJP Trust"). Ms. Poor appointed Mr. Lindell as trustee and named Ms. Gray as successor trustee. Ms. Gray testified that she did not know of the existence of the 2004 FJP Trust and pointed out that her last name was misspelled in the section appointing her as successor trustee.

Frederic, now 70 years old, is one of Ms. Poor's four children. He is a disabled Vietnam War veteran and lives in an assisted living facility in Florida. The 2004 FJP Trust is a Maine-based trust designed to support Frederic when sufficient funds are not available through traditional sources.

Not long after Ms. Poor established the 2004 FJP Trust (and the POA), she executed a Last Will and Testament in 2005 in which she named the Defendant and Ms. Gray as co-PRs. Ms. Poor's will and the bequests she made were divided into thirds: one third to her grandchildren, one third for Frederic's benefit, and one third for charities and non-profit organizations. Her will established two testamentary trusts: one for her grandchildren and one for Frederic called the Frederic J. Poor Supplemental Needs Trust ("Supplemental Needs Trust," with a purpose virtually identical to the 2004 FJP Trust). The Supplemental Needs Trust, however, had as co-trustee Bar Harbor Trust Services, while the Defendant was the sole trustee of the 2004 FJP Trust; and, apparently, he was the only person other than Ms. Poor who

knew of the existence of the 2004 FJP Trust (except perhaps the lawyer who drafted the trust document).

The Defendant used the relationship he had with Ms. Poor that he worked hard to develop, his authority under the POA, along with his status as trustee of the 2004 FJP Trust (particularly after Ms. Poor died), and his role as co-PR to loot her finances, estate, and assets in excess of $3.1 million. From 2010 through 2016, he committed theft regularly—often withdrawing cash, writing countless estate checks to himself or to his company RK Lindell & Co. (which he owned and ran himself) for phony management/estate/trustee fees (or simply writing checks with no memo lines). He frequently paid large personal expenses, including substantial credit card bills from money he placed in bank accounts in the name of the 2004 FJP Trust. He funded the 2004 FJP Trust with money and assets (e.g., cash, securities, an annuity, and an insurance policy) which were supposed to be used for Frederic's benefit. Furthermore, the Defendant purchased a home in northern California wine country (in Cloverdale, California), pretending it was an investment for the 2004 FJP Trust. He purchased and significantly renovated the home (for a total cost of approximately $900,000) for his personal and family use. Pictures of the renovated home are attached as Exhibit 2.

Mr. Lindell's thefts not only victimized Ms. Poor and Frederic, but also the other beneficiaries of Ms. Poor's generosity—her grandchildren and various charities and non-profit organizations who did not inherit the money and assets they should have because of Mr. Lindell's diversion of money away from the estate.

b. Gianna Lewis

Gianna Lewis was a long-time family friend of Mr. Lindell. She has known him perhaps since the day of his birth. Ms. Lewis and her late husband were close friends with Mr.

Lindell's parents (they often travelled together). He periodically visited Ms. Lewis in France over the years growing up, even getting engaged at her home.

Ms. Lewis' late husband trusted Mr. Lindell to manage US-based assets (here in Maine) Mr. Lewis set up for the benefit of his wife and their children. After Mr. Lewis died, Ms. Lewis continued to place her trust in Mr. Lindell, not only to manage these assets, but also to provide financial and investment advice and services. Unfortunately, Mr. Lindell was the only signatory on these Maine-based trust bank accounts.

As he did with Ms. Poor, from 2010 through early 2017, Mr. Lindell made numerous unauthorized withdrawals from Ms. Lewis' trust bank accounts and used her money to pay his personal and family expenses—with the theft exceeding $380,000. He accomplished this by writing checks to RK Lindell & Co., along with directly paying his or his family's bills (e.g., numerous credit cards and private high school tuition for one of his children).

Mr. Lindell tried to cover his tracks by comingling Ms. Poor's and Ms. Lewis' funds and transferring money between their bank accounts, using money from one victim to cover costs or transfers to the other victim (this was illustrated at trial when the State presented evidence of payments Mr. Lindell made to Ms. Lewis, which were shortly preceded by money he stole from Ms. Poor).

A Chronology of the Trial Evidence of the Defendant's Theft and Fraud

Mr. Lindell began stealing from Ms. Poor near the end of her life. Ms. Poor died at age 92 in June 2012. Beginning two years prior to her death when her health began to fail (from February 2010 through March 2012), he stole approximately $595,000 by engaging in securities fraud by diverting funds Ms. Poor entrusted to him for the purchase of various securities. On thirty-one (31) occasions over the course of approximately two years, Ms. Poor issued checks made payable to RK Lindell & Co., with Ms. Poor writing on the memo line the

name of the security to be purchased. Instead of using the funds to purchase the specific security, he deposited the checks into his bank accounts and spent the money on himself and his family. On eleven (11) of these thirty-one (31) occasions, however, Mr. Lindell did purchase the securities identified in the memo lines, but did not use the money Ms. Poor gave to him—he had already spent that money on himself and his family; instead he used other funds (cash or margin) from Ms. Poor's brokerage account to make the purchases. The result was to charge Ms. Poor twice for these eleven (11) designated purchases (amounting to an additional $298,000 theft).

Mr. Lindell testified that Ms. Poor gave these funds to him (the thirty-one (31) checks) in a secretive manner (to make the checks seem less suspicious to the "spies" at the bank) in order to shore up the finances of his failing business, but his story kept changing. He first testified these thirty-one (31) checks were capital investments into his business. Then he testified they were gifts. Then he testified they were capital investments/infusions.

Mr. Lindell failed to explain how $595,000 of purported gifts/capital investments over the course of two years were insufficient to keep his essentially one-man shop afloat. Nor could he explain why a sophisticated and intelligent investor such as Ms. Poor would repeatedly give him money—either as gifts or capital investments—when he admittedly was losing money month after month and purportedly telling her of his regular losses.

Mr. Lindell further misappropriated funds from Ms. Poor before she died by paying himself fictitious POA fees and directly writing checks from her bank accounts (as POA) for his personal and family expenses. In fact, he testified that there were checks which he wrote himself as POA because Ms. Poor was physically unable to fill out and sign the checks herself.

When Ms. Poor died in 2012 she left an estate worth approximately $4.4 million after administration and taxes, along with additional non-estate assets worth approximately $1.1

million (a life insurance policy and an annuity). Although the Defendant and Ms. Gray were co-PRs, the Defendant handled all the day-to-day work of administrating Ms. Poor's estate, while Ms. Gray, who lived in Ohio, had limited involvement in estate-related activities; and, much if not all of the limited administrative work Ms. Gray did perform was per the Defendant's instructions.

In his capacity as co-PR of Ms. Poor's estate, the Defendant issued himself or his company checks from the estate accounts for i) fictitious fees and ii) checks with no description in the memo line of the checks. These checks totaled almost $500,000. In fact, at trial Mr. Lindell admitted that even after Ms. Poor's estate was effectively settled (by mid-2014), and the estate's funds were distributed, he kept writing himself or his company checks from the estate account, on a regular basis for the next couple of years, totaling approximately $231,000 (of the almost $500,000). He also diverted an additional approximately $267,000 from the estate to the 2004 FJP Trust between October 2012 and April 2013. In total, Mr. Lindell stole more than $760,000 from the estate.

In 2013, Mr. Lindell purchased the home in Cloverdale, California for $425,000 and then spent approximately $475,000 renovating it over the next year and a half. He purchased the home and renovated it with the money he stole in 2012 from the proceeds of a Midland National annuity and a Hartford life insurance policy, both of which he had sold to Ms. Poor several years prior—which she purchased for Frederic's benefit. Mr. Lindell moved himself and his family into the Cloverdale home in mid-2014. He claimed the home was an investment for the 2004 FJP Trust, acting as some sort of caretaker of a vineyard estate.

The evidence at trial showed Mr. Lindell's actions were all a charade. He concealed a large portion of the money he stole by depositing the funds into bank accounts in the name of the 2004 FJP Trust, which only he controlled. He did not disclose to Ms. Gray or anyone else

that he opened these secret bank accounts or how he spent the money. None of the funds in these secret bank accounts were used for Frederic's benefit.

Ms. Gray also testified that Mr. Lindell directed her to liquidate securities in Frederic's name (totaling approximately $166,000) and to send the liquidated funds to him (Mr. Lindell) and she complied. Ms. Gray testified that she thought Mr. Lindell was going to deposit the funds into the testamentary Supplemental Needs Trust. Instead, he deposited the money into the 2004 FJP Trust—his personal hiding place—and spent the money.

At the same time, Mr. Lindell was raiding Ms. Poor's assets and money set aside for Frederic's benefit, her grandchildren, and charities and non-profits, he was stealing from Gianna Lewis. Ms. Lewis lives in France, where Mr. Lindell was born, and she has known him since he was a baby. She trusted him. See Exhibit 3, a statement from Ms. Lewis (in addition to her anticipated telephonic appearance expected at sentencing).

Mr. Lindell had direct access to Ms. Lewis' money because the funds were deposited in Maine bank accounts in the name of the Gianna Lewis Qualified Domestic Trust ("GLQDT"). Only Mr. Lindell had control of the GLQDT accounts. He used the same scheme to engage in theft from Ms. Lewis: he issued checks directly from the trust's Maine bank accounts to his company and to pay his personal credit card bills, withdrew cash, financed private high school tuition for one of his children, and paid for personal purchases at Macy's and Sam's Club, among other expenses.

In total, the Defendant stole approximately $382,000 from Ms. Lewis. At trial, he testified in sum and substance that much of the money he withdrew from Ms. Lewis' accounts (or which he transferred to his accounts by writing checks to his company) was part of an effort to assist Ms. Lewis with income tax evasion in France. Mr. Lindell testified that he brought Ms. Lewis large amounts of cash in order to help her evade French income tax, which Ms.

Lewis vehemently denied during her testimony. He backtracked on this assertion when the State cross-examined him on whether he was an accomplice to French tax evasion, participated in the federal crime of structuring, and failed to report bringing large amounts of cash into France.

In another example of the extent of the Defendant's theft and the means he used to perpetrate his scheme, the Defendant "resigned" as trustee of the 2004 FJP Trust in an effort to fraudulently obtain an $823,066 Midland National annuity payout that was designated for Frederic's benefit. Mr. Lindell testified that he resigned as trustee of the 2004 FJP Trust, appointed Ms. Gray, and then she later stepped down and reappointed him as trustee—all to satisfy Midland National's concerns of a conflict of interest (Midland initially declined to issue him the annuity payout, even in the name of the 2004 FJP Trust, because Mr. Lindell sold Ms. Poor the annuity).

Ms. Gray testified on her direct and rebuttal that she never took part in such a scheme and had no knowledge of what the Defendant did. She testified she did not know of the existence of the 2004 FJP Trust and had no knowledge of the theft, fraud, and machinations in which the Defendant engaged—and the documentary evidence presented at trial supported her testimony.

At trial, Mr. Lindell repeatedly asserted that he had the authority to spend Ms. Poor's and Ms. Lewis' money in the way that he did. Of course, the POA, will, and trust documents did not gift, bequeath, or permit him to spend money belonging to Ms. Poor, her estate, Frederic, the 2004 FJP Trust, or the GLQDT for his personal or family use—nor could these documents be read in any reasonable manner to support such a claim. He also testified that he spent money, liquidated securities, purchased the Cloverdale home, "sold" to the 2004 FJP

Trust artwork, among other things, all for the benefit of the 2004 FJP Trust. The evidence at trial, however, showed he acted for his own benefit and desires.

In addition to committing theft and securities fraud Mr. Lindell failed to pay income tax on the money he misappropriated for his personal use—this includes even the money he falsely labelled on memo lines in checks as fees, as well as money he earned by billing Bar Harbor Bank and Trust for fees related to the two testamentary trusts. He also stole state and federal income tax refunds because he failed to report all of the income he obtained under his fraudulent scheme—and therefore purported to qualify for thousands of dollars in income tax refunds.

Mr. Lindell's complete scheme of theft and fraud ran from 2010 through early 2017. In July 2014, he moved to the Cloverdale home. He continued to maintain a residence in Frankfort, Maine, through at least 2017 and filed part-time resident Maine income tax returns for 2014 and 2015.[1] He also lived in Maine from July 1, 2015, through August 31, 2015. Before Mr. Lindell moved to California, he had already stolen approximately $2.8 million from the Poor family assets and had stolen approximately $197,000 of the $382,000 theft from Ms. Lewis. See Exhibit 4, which shows a timeline of his thefts and the location of his residence and the bank accounts from which he stole.

Mr. Lindell continued to steal from the Poor family assets and Ms. Lewis' assets, and commit income tax crimes, after he moved to California, by withdrawing or spending money from the Maine-based bank accounts by check and electronically, and submitting false income tax returns to Maine Revenue Services located in Augusta. Signature cards for each bank

[1] The Defendant paid his reported 2014 tax liability on 10/15/2015 with a check drawn on a bank account with a Frankfort, Maine address (he reported no tax liability for 2015).

account from which he stole show the legal and actual addresses for the banks accounts were located in Maine.

In total, Mr. Lindell: i) stole in excess of $3.5 million dollars from Ms. Poor, her estate (and related beneficiaries), Frederic, and Ms. Lewis; ii) stole almost $10,000 in federal and state income tax refunds; and, iii) evaded almost $200,000 in Maine income tax.

SENTENCING ANALYSIS

Mr. Lindell was charged with offenses which occurred from early 2010 through early 2017. He committed these crimes pursuant to a common plan and scheme. His crimes required planning and a great deal of effort to pull off and to keep secret. Once the veil had been lifted his crimes were obvious (albeit complicated to track and reconstruct), but absent this piercing Mr. Lindell was successful in keeping his actions under wraps for a long time. In the end, the evidence showed he acted as a result of greed—utilizing his position of trust and authority to his full advantage.

Hewey Analysis

Mr. Lindell was found guilty of all counts in the Indictment as charged, two of which were Class B theft offenses, and numerous Class C offenses (securities fraud and income tax evasion) and Class D income tax offenses. Since this case involves multiple crimes, this Honorable Court must craft an aggregate sentence which selects the most serious or representative count(s) and must engage in a *Hewey* analysis for each selected count. *State v. Downs*, 2009 ME 3, ¶14, 962 A.2d 950, 954-955 (Me. 2009). Here, the State is seeking the imposition of consecutive sentences. In order to impose consecutive sentences, this Honorable Court must state its reasons for doing so on the record or in the sentences. 17-A M.R.S. § 1256(4). This Honorable Court may impose consecutive sentences when "the seriousness of

the criminal conduct involved in either a single criminal episode or in multiple criminal episodes…require a sentence of imprisonment in excess of the maximum available for the most serious offense." 17-A M.R.S. § 1256(2)(D).

The State recommends that the two theft counts and two income tax evasion counts be used for the *Hewey* Analysis and for the basis of consecutive sentencing.[2] The remaining counts should be made concurrent.

a. Basic Sentence

The first step in the sentencing process is to determine the "basic sentence." In doing so, this Honorable Court must consider the particular nature and seriousness of the offense(s) as committed by Mr. Lindell. 17-A M.R.S.A. § 1252-C (1).

i. Thefts

Mr. Lindell stole more than 300 times the Class B theft threshold of $10,001 from Ms. Poor, her estate and its beneficiaries, and Frederic. He stole more than 38 times the Class B threshold from Ms. Lewis. The trial evidence showed he did so through an intricate web of deception utilizing his status as a securities broker-dealer agent, POA, co-PR, and trustee—requiring him to act in good faith and/or in a fiduciary capacity. Moreover, the evidence at trial illustrated that if Ms. Lewis was no longer alive providing at least some limiting pressure on Mr. Lindell (i.e., if he stole too much she would have noticed) he likely would have stolen more money from her because that was the nature of his scheme (Mr. Lindell tried hard, though; Ms. Lewis testified at trial that when she questioned Mr. Lindell about some of her account statements he ripped them up and told her not to worry about them).

[2] The Securities Fraud count likely cannot be used for consecutive sentencing purposes since the offense was used to facilitate the Count 1 theft. See 17-A M.R.S. § 3 (B).

The trial evidence showed Mr. Lindell utterly abused the trust Ms. Poor and Ms. Lewis placed in him. These two elderly women were differently situated, but were equally isolated and vulnerable. Ms. Poor was isolated by the lack of close trusted family members and was in failing health when Mr. Lindell began stealing from her in earnest. Ms. Lewis has a close family, but speaks limited English and relied on Mr. Lindell to manage her money more than 3000 miles away.

Mr. Lindell's actions were part of a multi-year course of conduct, were well planned, and were detailed and intricate. Every theft is different, but it is hard to imagine more serious thefts which abuse trust and authority. Moreover, Mr. Lindell utilized secret bank accounts, checks and electronic transfers only he controlled, and misled his co-PR and several financial institutions. He also stole from a disabled war veteran who has no concept of finances and thus was a "perfect" victim for Mr. Lindell. And, by stealing from Ms. Poor's estate Mr. Lindell stole from her grandchildren, charities, and non-profits.

Given Mr. Lindell's abuse of trust and authority, the intricate and long-term nature of his theft, and the manner in which he used the 2004 FJP as his secret repository, the appropriate basic sentence for the Class B theft related to Ms. Poor (Count 1) is at least 9 years. A similar analysis applies regarding Mr. Lindell's theft from Ms. Lewis and her assets (Count 2). His task with Ms. Lewis' money was less difficult since there were no potential checks to his actions (such as Bar Harbor Bank and Trust, Ms. Gray, and Midland National—although even these checks on him did not stop his thefts). Mr. Lindell's actions in stealing from Ms. Lewis, however, were no less serious. And, while he stole less money from Ms. Lewis than he did from Ms. Poor that is only because there was less to steal—his goal and tactics were the same. A basic sentence of 6 years is appropriate for this Class B theft.

ii. Income Tax Evasion

Mr. Lindell engaged in five years of income tax evasion. While it is perhaps not surprising he failed to report as income the money he stole, the evidence at trial showed that he failed to report money he paid himself which he designated as estate/trustee/management fees and even failed to report the money Bar Harbor Bank and Trust paid him for the arguably legitimate work he did on behalf of the testamentary trusts established by Ms. Poor's will. There are a number of ways one can evade the payment of income taxes, such as simply failing to report income, keeping a double set of books, making false entries or alterations in bookkeeping records, destroying documents, concealing sources of income, handling one's affairs to avoid making records of transactions, or other conduct likely to mislead or conceal income. See *Spies v. United States*, 317 U.S. 492, 499 (1943) (citing examples of affirmative acts of income tax evasion, even when a taxpayer fails to file a return at all).

In this case, Mr. Lindell used secret bank accounts and assets only he controlled to conceal multiple sources of income, and arranged these sources of income to have as little of a trace to him as possible. He used the money he stole to finance a lifestyle filled with travel and dining, paying massive credit card bills, and to buy the Cloverdale home, all while providing a cloak of propriety to his wife, Ms. Gray, and all other involved parties. Utilizing Count 8 (for tax year 2013, the year in which Mr. Lindell evaded over $97,000 in income tax, almost 50 times the Class C income tax evasion threshold of $2,001), the appropriate basic sentence for such conduct is the upper tier for a Class C offense, 3 years. Utilizing a similar analysis for Count 7 (income tax evasion) regarding tax year 2012 in which Mr. Lindell evaded over $47,000 in Maine income tax, the appropriate basic sentence of two years is appropriate.

b. Maximum Sentence

The next step is to determine "the maximum period of imprisonment. . . by considering all relevant sentencing factors, aggravating and mitigating, appropriate to that case." §1252-C (2).

It is in the second step wherein all of Mr. Lindell's conduct and characteristics can be properly placed into context. For this step, in addition to the extent and breadth of Mr. Lindell's actions, along with his failure to accept responsibility, there are five areas this Honorable Court should consider in particular:

i) Mr. Lindell's past related conduct and securities disciplinary history;

ii) Mr. Lindell's bail violation;

iii) Mr. Lindell's use of the Cloverdale home to obtain a $450,000 loan to continue to fund his lifestyle, along with his so-called "sale" to the 2004 FJP Trust of the $150,000 loan he took from his aunt;

iv) Mr. Lindell's misuse of his wife's inheritance (Althea Lindell placed her inheritance from her mother in a joint account and relied on Mr. Lindell to manage the funds), as well as Mr. Lindell providing to Ms. Lewis fraudulent financial statements related to investments separate from the money he stole from her which was the subject at trial; and,

v) significantly, the evidence at trial showed that Mr. Lindell testified falsely, accusing Ms. Lewis and Ms. Gray of misconduct.

i. *Past History*. Mr. Lindell does not have a criminal record, but he is not a typical first-time offender. Not only was his conduct part of a long-running scheme—with him effectively committing crimes on a regular and continuous basis from 2010 through early 2017, he also has an administrative disciplinary record. This includes a 2002 action for allegedly

arraying client investments contrary to client wishes and not being truthful about account balances and a 2013 action for allegedly engaging in unlawful, dishonest or unethical securities practices (both the 2002 and 2013 actions ended in consent orders). In fact, the 2013 action involved Mr. Lindell allegedly having a client write three checks directly to RK Lindell & Co., just like he did in this case when he had Ms. Poor directly write his company $595,000 in checks for securities purchases (thus taking the broker-dealer he worked for out of the supervisory picture). Further, subsequent to the 2013 action, Mr. Lindell (in mid-2015) again accepted a check made out to himself directly from the same client involved in the 2013 action. See Exhibits 5a through 5e, which includes copies of (redacted) checks and other disciplinary actions which the State will briefly discuss at the sentencing hearing.

ii. *Bail Violation.* In April 2018, this Honorable Court issued a warrant for Mr. Lindell's arrest because of alleged bail violations contained in the State's motion to revoke his bail. Mr. Lindell admitted at the bail hearing (July 2018) that the State had sufficient evidence to prove the factual allegations in the State's motion, although he argued he did not intentionally violate his bail. Essentially, the motion to revoke alleged that Mr. Lindell continued to act as trustee for the 2004 FJP Trust and he improperly spent money in the trust's name, contrary to his conditions of bail. The money Mr. Lindell spent came from a $450,000 "hard money" loan he obtained in the name of the 2004 FJP Trust before he was criminally charged. Hard money lenders lend money to borrowers who are not able to qualify for traditional loans. Payment terms and interest rates are typically costlier than with traditional lending.

Mr. Lindell obtained the hard money loan using the Cloverdale home as collateral (which he had purchased free and clear with the money he had previously stolen from Ms. Poor and Frederic). While Mr. Lindell did obtain the loan before this criminal action began, his

conditions of bail prohibited him from acting in a trustee capacity (with a limited exception that does not apply here) or accessing accounts in Frederic's name or related to Frederic. Mr. Lindell used some of the loan proceeds to service his monthly loan payments and argued at the hearing on the State's motion to revoke that he was simply trying to keep the loan current. Of course, he also transferred in excess of $131,000 to his joint personal checking account (much of which he spent on numerous personal expenses), spent tens of thousands of dollars of the loan proceeds in the trust's name to buy digital crypto currency, and he withdrew $51,500 in cash in the name of the trust.

iii. *Loan Related Misconduct.* The $450,000 hard money loan was not just the eventual basis for the motion to revoke bail. Purchasing the home free and clear with stolen money gave Mr. Lindell a valuable asset. For reasons perhaps only he knows, he took out an extremely costly loan (at 10.99%, with payment terms that resulted in a total of $600,000 being owed and due in a 36 month loan repayment period). Mr. Lindell may very well have obtained this loan because he was aware of the State's criminal investigation and by the time he obtained the loan (February 2017) he had spent virtually all of the money from the available Poor family assets. Ms. Lewis was (and remains) healthy—and with more limited assets than that of Ms. Poor, Mr. Lindell had no more access to unlimited money.

What Mr. Lindell did with the proceeds from the $450,000 loan is not the only unfortunate part of the transaction. At trial, the State proved that Mr. Lindell submitted multiple false documents in order to obtain the loan. He represented that he did not live at the property and that it was being used for business purposes. Moreover, he falsified his wife's signature on a lease to make it appear he had a paying tenant.

iv. *Production of Falsified Financial Statements.* Ms. Lindell and her brothers and sisters inherited money from their mother. Ms. Lindell's share was approximately $100,000,

which she placed into a joint brokerage account and trusted her husband to manage. A few months after Mr. Lindell was charged in this case Ms. Lindell asked her husband about her inheritance. He provided her fraudulent financial statements showing that the inheritance was still intact. Ms. Lindell checked with her broker-dealer and learned, in fact, almost all of the money was gone. See Exhibit 6a through 6e, which show the materials Mr. Lindell drafted for his wife, along with the (redacted) brokerage statements showing the actual value of her investments.

Mr. Lindell similarly provided Ms. Lewis with fraudulent financial statements regarding annuities and additional securities he was managing for her. He provided her with a fraudulent statement reporting far larger account balances than existed. See Exhibits 7a through 7b, which show how Mr. Lindell inflated account values and which the State will briefly discuss at the sentencing hearing.

v. *False Statements.* It is difficult to pinpoint all of the false statements Mr. Lindell made during his testimony. The trial evidence showed that he blamed everyone but himself. He accused Ms. Lewis of French tax evasion and testified that Ms. Gray reappointed him as trustee of the 2004 FJP Trust so that he could continue as trustee after he obtained the Midland National annuity proceeds. He testified that Ms. Poor, by all accounts a prudent and experienced investor who was very careful with her money, repeatedly gave him money to fund his essentially one-person business which he could not keep above water despite her "investing" or "gifting" him $595,000 over a period of just two years. In addition, over the State's objection Mr. Lindell was permitted to testify in detail about the value of various works of art which he estimated to be worth over $400,000 that he claimed to have sold to the 2004 FJP Trust. According to the attorneys who took over representing Frederic and his interests, and who were responsible for appraising and selling this artwork for Frederic's benefit, the

artwork is worth a fraction of this amount. So far, approximately $10,000 has been recovered for the artwork. Moreover, some of the artwork Mr. Lindell allegedly "sold" to the trust was not his to sell, it belonged to his sister. See Exhibit 8, which are the documents the State received from Camden Law (the attorneys who represent Frederic's interests).

All of the examples listed above serve as aggravating factors. The State finds no mitigating factors (Mr. Lindell's assistance to Camden Law at the time of the bail violation hearing in identifying remaining assets was a self-serving exercise on his part). The maximum sentence on the Phyllis Poor family related theft (Count 1) should be increased to the maximum permissible sentence of ten years. The maximum sentence for the Gianna Lewis theft (Count 2) should be increased to seven years. The income tax evasion sentence (three years) (Count 8) should be increased, as well, but the aggravating factors are already sufficiently reflected by including them in the theft counts. The additional income tax evasion sentence (Count 7) should remain at two years. This totals twenty-two (22) years.

c. Final Sentence

The last step in the sentencing analysis is to determine what portion, if any, should be suspended. 17-A M.R.S.A. § 1252-C (3). An unsuspended portion of 15 years is appropriate in this case. There are several reasons for this and the analysis is similar to the second step in the *Hewey* analysis noted above.

First, this is not a typical first offender case. As noted, the trial evidence showed Mr. Lindell committed crimes on a regular basis over at least a six-year period and groomed Ms. Poor since the early 2000s and abused the trust both women placed in him. The trial evidence and materials included in this memorandum show Mr. Lindell has committed similar acts of dishonesty in past years with other clients and his (now ex) wife.

Mr. Lindell did not commit these crimes as a result of financial desperation. There was no family or health emergency. His actions were not a consequence of a lapse in judgment. His conduct spanned many years and was calculated, planned, and well thought out. And, he has failed to accept responsibility.

The evidence at trial showed Mr. Lindell stole much of the life savings from two individuals and their families, plundering the property and life savings of his clients and their beneficiaries. As a trusted and licensed financial professional, he should have helped them grow their assets in order to provide for their own health and care and that of their family and persons or organizations of their own choosing. He betrayed this most basic tenet.

Mr. Lindell leaves financial, emotional, and physical wreckage in his wake. And, he leaves his spouse (and children) devastated and left to move on independently. Althea Lindell has been joined as a defendant in a suit Frederic's legal representatives have filed against her ex-husband. Ms. Gray also is a defendant based upon her role as co-PR. Mr. Lindell's conduct has had far reaching consequences.

The State recognizes it is requesting the imposition of a very significant sentence. The facts of this case justify such a sentence. Title 17-A M.R.S. § 1151 contains several sentencing factors which are particularly relevant in this case and support the State's recommended sentence. These include promoting both specific and general deterrence and providing fair warning to the public of the nature of sentences imposed for this kind of conduct. 17-A M.R.S. § 1151(1) & (4). The recommended sentence also recognizes Mr. Lindell's past years of similar conduct and will serve to protect the public from an individual who the evidence shows does not comply with securities regulations, bail conditions, and preys on vulnerable individuals in ways which are very difficult to detect (in particular recognizing "[t]he age of [a]

victim, particularly of a victim of an advanced age…who has a reduced ability to self-protect or who suffers more significant harm due to age"). 17-A M.R.S. § 1151(1) & (8).

In order to permit a partially suspended sentence the State suggests the following sentence:

i. three years straight on Count 8 (income tax evasion);

ii. a consecutive seven years straight on Count 2 (theft);

iii. a consecutive ten years, with all but five years suspended on Count 1 (theft); and three years of probation;

iv. a consecutive two years, all suspended on Count 7 (income tax evasion) with two years of probation;

v. a concurrent sentence of three years on Count 3 (securities fraud), concurrent sentences of two years on Counts 4 and 5 (theft of income tax refunds), concurrent sentences of two years on Counts 6, 9, and 10 (income tax evasion), and concurrent sentences of 180 days on Counts 11-15 (failure to pay tax); and,

vi. Restitution as part of the Judgment and Commitment in the amount of $2,919,398. This reflects the recovery of approximately $474,000 by Frederic's legal representatives. This also reflects money that Ms. Lewis recovered as a result of the comingling of funds (albeit at Ms. Poor's expense), and does not include the $298,000 of unauthorized securities purchases from the eleven (11) transactions discussed above, since it is possible Ms. Poor had the use and enjoyment of these funds before she died or that these eleven (11) securities passed to the estate—although, this is a significant assumption.

In terms of a breakdown, the restitution consists of:

a. $2,400,028 for the benefit of Ms. Poor's estate (and its beneficiaries) and Frederic;

b. $312,674 for the benefit of Ms. Lewis;

c. $198,531 for the benefit of Maine Revenue Services; and,

d. $8,165 for the benefit of the IRS (which the State will forward to the IRS).

The State suggests that the Judgment and Commitment state that any recovered monies are to be paid first to Ms. Lewis, then for the benefit of Frederic, then for the benefit of the remaining beneficiaries of Ms. Poor's estate, then to Maine Revenue Services, and then to the Internal Revenue Service. Mr. Lindell will receive credit for any additional money or assets recovered.

The State also respectfully rejects any claim Mr. Lindell may make that his services as co-PR, POA, or Trustee should be reasonably compensated beyond what he was paid by Bar Harbor Trust Services for the work he performed for the testamentary trusts (approximately $30,000). The evidence at trial showed that he created and participated in a criminal enterprise and used the cover of legitimate work to ensure he could secretly raid the wealth of Ms. Poor, Frederic and Ms. Poor's estate (and her beneficiaries). And, the evidence at trial showed Mr. Lindell simply stole from Ms. Lewis' assets. He cannot reasonably claim he should be paid for managing Ms. Lewis' assets when he was managing them as a source of his theft. Moreover, aside from the e-mails he sent to Bar Harbor Bank and Trust Mr. Lindell produced no billing statements nor any reliable evidence of how much time he spent working on non-criminal activities and what the activities were.

Special conditions of probation should include: enter into a restitution payment plan per the Department of Corrections; timely and truthfully file all income tax returns and timely pay any liability thereon; be prohibited from acting, in any manner, as or in the capacity of a power of attorney, trustee, personal representative or executor, conservator, or fiduciary; be prohibited from engaging or assisting in the sale or trade of any "securities" (as the term is defined under the Maine Uniform Securities Act); and, be prohibited from acting or associating with a "broker-dealer," "broker-dealer agent," "investment adviser," or an "investment adviser representative" (as these terms are defined under the Maine Uniform Securities Act).

COMPARABLE SENTENCES

With respect to comparable sentences, the Law Court has held that sentencing justices should compare basic sentences, not final sentences, *see, State v. Stanislaw*, 2011 ME 67 ¶ 8, 21 A.3d 91, 94-95; *State v. Gauthier*, 2007 ME 156 ¶ 30, n.4, 939 A.2d 77, 85, but the State does not have a database of basic sentences imposed in theft cases. To the extent that final sentences can be used as a comparison, the State's proposed sentence reflects the grave and long-term nature of Mr. Lindell's crimes and is a proper extension of the sentences referenced below (which is not exhaustive and does not include complete criminal histories), but is provided to show the range of similar theft, fraud, and/or abuse of trust cases previously prosecuted). Most of these sentences resulted from plea resolutions, although a few were imposed after trial.

- Robert Howarth (consolidated in Waldo County, BELSC-CR-15-125 and ALFSC-CR-15-588). Howarth befriended Midcoast residents in 2009 and then defrauded them out of more than half a million dollars. He was sentenced to serve ten years, all but six years suspended and ordered to pay $575,000 restitution. Howarth had an extensive criminal record in Massachusetts for similar conduct. (R. Murray, J.)

- Claudia Viles (Somerset County, CR-15-1186). Viles was convicted after a trial of Class B Theft by Deception as well as a series of Class D charges in relation to embezzling excise taxes over an extended period in the Town of Anson. Viles was the town tax collector. Viles was sentenced to an eight-year term of imprisonment with all but five years suspended. She was also sentenced to three years of probation and ordered to pay $566,257.65 in restitution. She had no prior record. (Mullen, J.)
- Ronald Petersen (York County, CR-2013-01369) was sentenced to eight years, all but three years suspended, for fraudulently billing MaineCare for $403,236 for a purported substance abuse treatment facility, by falsely representing he had licensed or qualified staff and by falsely billing for services not provided. (O'Neil, J.)
- Leanne Parks (Penobscot County, CR-2012-2510) was sentenced after her plea of guilty to three years all but 18 months suspended for stealing $94,655 from a non-profit beagle rescue organization on which she served as president and a volunteer. (Campbell, J.)
- Paul Violette (Cumberland County, CR-2012-505), former executive director of the Maine Turnpike Authority, was sentenced to three years and six months after his plea of guilty to an Information alleging Class B theft by using Turnpike funds to purchase gift cards for international travel, hotels and restaurants and diverting them to his own use. He paid restitution of $144,000 prior to sentencing, so there was no purpose in probation or a split sentence. (Cole, J.)
- Bettysue Higgins (Kennebec County, CR-2011-112) was sentenced to six years, with all but three and a half years suspended for stealing $166,700 from the Maine Trial Lawyers Association while working as the Association's administrative assistant. (Marden, J.)

- James Philbrook (Aroostook County, CR-2011-10), a financial advisor, was sentenced after trial to eight years, all but three years suspended, for stealing $195,000 from his clients, an elderly couple who were potato farmers, instead of investing the money as represented to them. (Hunter, J.)
- Tammy Barker (Penobscot, CR-2010-187) was sentenced to eight years, with all but three and a half years suspended for failing to turn over $400,000 from the sales of mobile homes to the owner-sellers. (A. Murray, J.)
- Dawn Solomon (Oxford County, CR-2010-521) was sentenced to eight years all but 42 months suspended after a plea to an Information charging her with theft from MaineCare. Solomon admitted to obtaining $4 million by overbilling and submitting false cost reports in connection with her operation of Living Independence Network Corporation, which provided children's day habilitation services. A significant mitigating circumstance was that she had a minor special needs daughter who was dependent upon Solomon for her care. (Clifford, J.)
- Eric Murphy (Hancock County, CR-09-149) was sentenced after trial to nine years, all but five years suspended, for stealing approximately $450,000 from a Maine couple and several out-of-State investors based on misrepresentations on how he intended to use the funds. (Cuddy, J.)
- Jonathan Rosenbloom (Cumberland County, CR-07-1211). Rosenbloom entered a guilty plea to Class B Theft by Misapplication and two counts of Class C Securities Fraud in 2008 involving $160,000 of scam investments in Italian real estate and misuse of E*TRADE margin accounts to defraud acquaintances of over $20,000 in 2008. Rosenbloom was sentenced to eight years on the theft charge and four years on the securities charges. All but four years of imprisonment were suspended, with three

years of probation. Rosenbloom was ordered to pay $156,059.03 in restitution. (Warren, J.)

- Thomas Acker (Cumberland County, CR-06-423). Acker was convicted after pleading guilty to Class B Theft by Misapplication and Class C Sale of Unregistered Securities to business clients. Promises of extraordinary profits were made in the sale of those unregistered securities. Acker, an attorney, abused the trust of his victims. The total losses established were $2,600,000. Acker was sentenced to seven years of imprisonment with all but 2 years and 9 months suspended and order to pay $2,075,159.10 in restitution. (Cole, J.)
- Gerald Nelson, Jr. (Kennebec County, CR-06-568) was sentenced after a trial to seven years, all but four years suspended (reduced from five years when the conviction on one count was vacated by the Law Court), and ordered to pay restitution of $94,558 for pocketing the proceeds of the sales of wood harvested from 10 woodlot owners who had contracted with him for the service and had been led to believe that they would be paid for stumpage. (Horton, J.)
- William Gourley (Penobscot County, CR-05-557). Gourley pled nolo contendere to Class C Theft by Deception in relation to a sprawling real estate and mortgage scam involving over one hundred victims in what was, essentially, a Ponzi scheme. Gourley was sentenced, by agreement, to a five-year term of imprisonment with all but two years and six months suspended. He was also sentenced to four years of probation with special conditions including travel restrictions, waiver of extradition and restitution in the amount of $5,000,000.00. (Cole, J.)

- Felisa Ricks (Cumberland County, CR-05-2594) was sentenced to eight years, with all but four years suspended, for embezzling approximately $196,000 from her former employer; she had one prior misdemeanor conviction. (Alexander, J.)
- Paul McFarland (Hancock County, CR-00-62), a former funeral home director, was sentenced after his plea of guilty to nine years, with all but seven years suspended, for stealing approximately $500,000 from almost 200 mortuary trust accounts over a 10-year period. (Pierson, J.)
- Doris Reed (Kennebec County, CR-95-519). Reed, an assistant clerk for the Town of Chelsea, was sentenced to eight years, all but four years suspended, and four years of probation, for the theft of $100,000 in excise taxes. (Alexander, J.)

CONCLUSION

By reason of the foregoing, this Honorable Court should impose the sentence recommended by the State.

Respectfully submitted.

Dated: April 17 2019

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RE: Regulatory Notice 19-36 - comment on proposed Rule 3241

There are obvious fundamental differences for a Registered Person being a passive beneficiary versus being in an active trusted position for an individual or entity. There should be separation between these two scenarios, not consolidation under one rule. While it makes sense to have a rule regarding naming a Registered Person as beneficiary, Rule 3270 has provided an adequate framework for review of trusted positions. Positions of trust and beneficiary statuses need to be discussed and addressed separately.

Holding a Position of Trust for or on Behalf of a Customer:

Like the Firms that FINRA surveyed, our Firm procedures provide for reviews of any trusted positions through the Outside Business Activity review process. Rule 3270's *prior written notice* requirement helps hold Representatives directly accountable, allows a review period by Firms, and reduces Firms' liability if a Representative were to knowingly take a trusted role without disclosure. While we don't see the proposed rule as having a substantial impact to our Firm, we do believe Rule 3270 is sufficient in addressing trusted roles for clients. If Rule 3241 were implemented, would both this rule and Rule 3270 need to be appeased going forward? There are already overlapping rules that require consideration with this scenario (E.g. SEC Rule 206(4)-2). A new rule would only be adding another regulatory layer to a scenario that is sufficiently supervised.

As an alternative, Rule 3270's potential revision per Regulatory Notice 18-08 could address trusted positions as a provision, if necessary. Keep in mind that there are other OBAs that could also easily have their own rules and guidance (E.g. Outside RIAs?).

Being Named a Customer's Beneficiary:

Yes - It makes sense to have a rule relating to a Registered Persons' beneficiary status with a client, especially with an effort to enhance public trust of the financial services industry. As mentioned above, the *prior written notice* requirement alleviates Firms by having a straight forward method for disclosure, review, and decision making. However, Firms should be able to determine that method for disclosure, not FINRA. A pre-disclosure requirement wouldn't have a substantial impact given the rarity of these requests.

Recommended Next Steps:

The inherent risks of either of these situations have *always* provided incentive for Firms and Registered Persons to follow up and act prudently. Firms, Registered Persons, and even clients know that appointing a Registered Person into a trusted position, or as a beneficiary, requires heightened review and supervision. FINRA should be able to review Firms' and Registered Persons' conduct pertaining to trusted positions without including it in a new rule. Instead, clarify that trusted positions fall under Rule

3270, or provide supplemental information if Rule 3270 is to be revised. A pre-disclosure requirement for the beneficiary status of a non-family client is intuitive, especially in the spirit of gaining public trust. However, keep the rule simple and allow Firms the flexibility to determine how they want this disclosed, if even permitted. Compliance Teams have been handling these two items without a specific rule in place for some time. It is an All-or-None case for FINRA: If you want to provide members specific guidance and rules on these two scenarios, then you could expand that into other types of conflicts of interest, OR keep the rules simple, straight-forward, and allow Members to do the right thing as they likely have been throughout their own Firm's history.

Thank you,

Thomas Holubiak
Compliance Officer
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January 10, 2019

Ms. Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street NW
Washington, DC 20006-1506

Dear Ms. Mitchell:

The American Securities Association (ASA)[1] welcomes the opportunity to comment on the Financial Industry Regulatory Authority's (FINRA) proposed Rule 3241 – Registered Person Being Named a Customer's Beneficiary or Holding a Position of Trust for a Customer ("Proposal").[2] ASA supports the Proposal and appreciates the careful work FINRA conducted to address an important investor protection issue.

The relationship between retail investors and their investment advisor is built on trust. The ASA strongly supports efforts by FINRA and the Securities and Exchange Commission (SEC) to enforce rules that prevent unscrupulous actors from taking advantage of their clients, particularly those who are elderly, vulnerable, or may not have the capacity to make sound decisions on their own. These practices are shameful and they only serve to impugn the reputation of the entire financial services industry.

As the Proposal notes, one area of necessary oversight for firms and regulators are cases in which registered representatives of brokerage firms have been named as a customer's beneficiary, executor, trustee, or as a power of attorney for the customer. While such designations can be common practice for instances in which the registered representative is a family member, there is also the potential for abuse.

The Proposal is careful not to prohibit a registered representative from being named a beneficiary or holding a position of trust with a customer in certain instances. For example, where a longstanding friend or non-immediate family member of a broker wishes to name the broker as a beneficiary or have them serve as power of attorney at a certain point in time. There are valid reasons for these arrangements to exist, and FINRA should not seek an outright prohibition on such designations.

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[1] The ASA is a trade association that represents the retail and institutional capital markets interests of regional financial services firms who provide Main Street businesses with access to capital and advise hardworking Americans how to create and preserve wealth. The ASA's mission is to promote trust and confidence among investors, facilitate capital formation, and support efficient and competitively balanced capital markets. This advances financial independence, stimulates job creation, and increases prosperity. The ASA has a geographically diverse membership base that spans the Heartland, Southwest, Southeast, Atlantic, and Pacific Northwest regions of the United States.

[2] Regulatory Notice 19-36

The Proposal would require FINRA member firms to have sufficient procedures in place to protect against wrongdoing, and that firms are made aware in writing that a customer wishes to name a representative as a beneficiary *prior* to such a designation being made. These are reasonable requirements that would not upset legitimate cases where a broker is to be named a beneficiary or granted a position of trust.

We are pleased that the Proposal recognized that many firms already have some type of policy in place to limit or prohibit beneficiary designations that do not involve a familial relationship. We believe that the Proposal strikes the correct balance as it would not prohibit firms from implementing their own more stringent policies than outlined under Rule 3241, but it does provide some baseline expectations for what firms should do to prevent abuses.

FINRA member firms are in the best position to identify 'red flags' in this area and would be further empowered to do so under the Proposal.

In response to one of the questions put forth in the Proposal, we believe that for most firms, the Proposal would not fundamentally alter current practices or significantly increase the costs of compliance. However, it would help crack down on those instances where unscrupulous actors within the industry try to exploit existing loopholes within the regulatory framework.

We believe that the Proposal will ultimately benefit and protect investors and look forward to working with FINRA as this initiative moves forward.

Sincerely,

Christopher A. Iacovella

Christopher A. Iacovella
Chief Executive Officer
American Securities Association

Re: trusts etc.

This is so wrong! I have been in the business for over 50 years. My clients think more of me then their doctors and lawyers when it comes to their financial well-being. We all know how doctors make many errors with their own assets. Over this period I have built up a trust or they would not ask that I be their trustee.

When I speak to my clients I am not just talking about their financial health but their golf game, kids in collage etc. A bank as trustee could care less. Also. I have found that the first thing that happens is they undo many of the things the grantor established in order for the trust to fit into THEIR system.

Understand the creator of these trusts had a thought process that they believe their broker not only understood but also would follow. A bank or lawyer follows their own set of rules by making the trust "fit" into one of their preset groups. I have worked on more estates then some lawyers.

Soooo what should be done!

In my opinion slight changes in firms supervisory procedures could address most everything. Having buy and sell orders pre-approved should be addressed. Fees for commissions should be reasonable. Wrap fees should not exist unless the trustee waves his trustee fee. (Shouldn't collect on both sides"

Bob Kaplon
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FAX: 973-966-6319

Good Morning,

My comment RE: this proposed rule is this: I am a corporate securities attorney with a series 65 license that represents corporations and others in a trust position all the time as an attorney. I hope that FINRA will consider specifically addressing the unique position of being an attorney in its rules so as to not hinder us from providing services to our legal clients while at the same time holding a series 65 license. Thank you

Yours For Providing Everyone Access to Capital Markets,

***Ms. Dar'shun Kendrick, Esq./MBA/Series 65 (Investment Adviser Representative) License Holder* (My Bio & Pic [slideshare.net])**
Capital Compliance Counsel, Kendrick Advisory & Advocacy Group, LLC
(404) 697-8006 [cell] * Text is best, email is good, calling is the worse.
Website [kaag.co]

FITAPELLI & KURTA
ATTORNEYS AT LAW

January 10, 2020

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Notice to Member 19-36

Dear Ms. Piorko Mitchell:

We are writing to express our disappointment with FINRA's proposed rule concerning registered representatives being named a customer's beneficiary or holding a position of trust. We are writing to suggest other approaches which should be considered. Specifically, we believe the proposal should be modified in three ways.

First, FINRA should have a blanket prohibition on registered representatives receiving bequests or holding a position of trust for a customer ***with the only exception being situations involving immediate family.*** Second, the definition of immediate family should exclude this phrase "any other person whom the registered person financially supports, directly or indirectly, to a material extent" as the phrase is too ambiguous and outside of any conventional definition of "immediate family." Finally, FINRA should still require member firm notification and approval for situations involving a registered representative's dealings with immediate family members.

We hope that FINRA will take these suggestions seriously. The great irony in this proposal is that the same parties who vigorously opposed being held to a fiduciary standard are willing to serve as fiduciaries, but only if there is some monetary benefit to them. For more information on this issue, please visit our website at: www.stopbrokerfraud.com

Sincerely,

FITAPELLI KURTA
Attorneys-at-law

Mack Investment Securities, Inc.

Since 1986

January 9, 2020

Re: FINRA Regulatory Notice, 19-36

We are in generally in favor of the proposed rule to have member firms employ heightened scrutiny in assessing, and potentially limiting, an associated person from being named a beneficiary, executor or trustee, or to have a power of attorney or similar position of trust for or on behalf of a customer.

However, we would also consider the addition of a custody rule to allow for forced supervision in situations above a specified ceiling that is adjusted periodically for the time an advisor is in a fiduciary role (disability of customer).

The issue is clear. An unscrupulous, conniving advisor/broker or associated person. And, what better position to acquire access to a client's estate than gaining trust by demonstrating an expertise of handling money - and skilled in relationship psychology.

Is this the job of FINRA? To a limited extent, yes. FINRA members are a first line of defense in this situation for our customers. This obvious customer/advisor conflict of interest needs to be addressed and mitigated, if necessary, by a common-sense supervisory structure.

Certainly, those advisors who look to gain a customer's trust with a final goal of rerouting funds to their personal account, are an issue that is already recognized. Capturing these vulnerable situations is the intent of this rule.

However, FINRA should offer specific guidance if this rule is implemented. Without guidance, an overzealous supervisor or supervisory system could restrict client access to an advisor as their fiduciary and, potentially, cause harm to the customer.

1) **Power of Attorney.** Broker/advisor talks a client into granting power of attorney to him/her/they as opposed to the client's family. This is a concern that a client, and their family, likely already expect is being addressed. Without a supervisory structure and review, and with enough money at stake, the situation could lead to a family's financial loss and potential litigation.
    a. An advisor/broker or associated person becoming a trustee or power of attorney carries a significant risk for a client. This is already addressed by the SEC with investment advisors as a custody issue. And custody, under SEC investment advisor regulations, demands surprise audits to review balances, transactions and fiduciary responsibilities (specific exceptions exist in this rule).

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Suite 300
Northfield, Illinois 60093

847/657-6600

Member FINRA, SIPC
Registered
Investment Advisor

We would suggest adding a similar surprise audit requirement to this rule during the time a fiduciary relationship exists unless an estate size falls below a specified dollar amount (cost of the audit could be prohibitive for the benefit of the client).[1]
We would carry this rule forward for executors and trustee relationships, after a customer's demise, with the similar rule (with exceptions), as well.

2) **Beneficiary designation.** Supervisory review of a beneficiary designation, in our opinion, is sufficient to address these situations. Specific FINRA guidance should be considered to assist supervisory review.
An example: a client with no living heirs may choose to select their advisor/broker as a beneficiary due to a history of care and concern. The rule should allow supervisory discretion to grant this result. For more debatable situations, a supervisor could be held liable for allowing a questionable beneficiary designation without a full review and explanation.

We can see many different potential situations that may present themselves leading one to say this should be a case-by-case process.

Summary:
Positions of trust. We believe the addition of a custody rule should be considered for positions of trust during the fiduciary period similar to the already existing SEC custody rule.
Beneficiary designations. Beneficiary designations should be decided on a case-by-case basis, as this rule suggests, with specific guidance for supervisory control.

Respectfully,

Stephen W. Mack, CFP
President

[1] https://www.sec.gov/rules/final/2009/ia-2968.pdf

VIA ELECTRONIC MAIL: pubcom@finra.org

January 10, 2020

Ms. Jennifer Piorko Mitchell
Office of the Corporate Secretary
The Financial Industry Regulatory Authority, Inc.
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 19-36: Registered Person Being Named a Customer's Beneficiary or Holding a Position of Trust for a Customer

Dear Ms. Mitchell,

Cambridge Investment Research, Inc. ("Cambridge") appreciates the opportunity to comment on Regulatory Notice 19-36 and proposed Rule 3241: Registered Person Being Named a Customer's Beneficiary or Holding a Position of Trust for a Customer. Cambridge acknowledges the potential conflicts that may arise when a registered person holds a positon of trust or beneficial interest relative to a customer's account and supports enacting a rule to address such conflicts.

Cambridge supports policies requiring a registered person to notify the member firm when that registered person, or an immediate family member of that registered person, is named a beneficiary or nominated as a fiduciary (i.e. as Attorney-in-Fact under a POA, as Trustee under a Revocable Trust, or as the Personal Representative) of the estate of a customer. Such a notice requirement should include whether an account is held by a relative of a registered person or not. Each instance should be reviewed on a case-by-case basis and the facts and circumstances surrounding the nomination considered within the broader context of the registered person's relationship with the customer, as well as the customer's express wishes.

While Cambridge agrees with many aspects of the proposed rule, and in fact requires its registered persons to notify the Firm if the registered person is nominated as a beneficiary of a customer's estate or to receive a bequest from the customer's estate, Cambridge believes that a few modifications would better align the proposed rule with its intent to protect investors.

Specifically, Cambridge proposes the following modifications:

- Amend the "Obligations of the Registered Person";
- Exclude executorships from the Proposed Rule's intended scope; and
- Amend the definition of "Customer."

1. PROPOSED MODIFICATIONS

a. Modifications to the "Obligations of the Registered Person"

With respect to the nomination of a registered person as a beneficiary or recipient of a bequest, a situation could arise where the registered person did not have sufficient time to obtain approval of the member firm prior to the customer's death. A mandatory rejection of the customer's nomination under such circumstances, could result in a scenario where the customer's intended designation would fail in its entirety. Such a result could have significant, adverse consequences for the customer's estate.

In order to address this potential scenario, Cambridge proposes adoption of a presumption in favor of the validity of the nomination unless and until, based on a subsequent review, the member firm determines that the nomination should not be honored. Such a presumption would give member firms the degree of flexibility necessary to determine reasonable compliance with the proposed rule while honoring a customer's valid wishes.

b. Exclude Executorships

As executorships are typically subject to judicial review, and often pertain to the customer's posthumous estate, Cambridge respectfully suggests that the inclusion of Executorships in the proposed rule is unnecessary.

c. Amendment to the Definition of "Customer"

Cambridge requests FINRA eliminate the phrase "or in the previous six months" from the definition of "customer" under .01 of the Supplementary Material. Inclusion of this language denies the member any flexibility in accommodating fact-specific circumstances when applying the proposed rule. For example, in an effort to remove a potential conflict of interest. a member might reassign the customer's account to another advisor, thereby eliminating a potential conflict of interest while still honoring the customer's intention to nominate the registered person as a beneficiary or to a position of trust. The proposed definition of "Customer" as written effectively precludes such an accommodation, and instead acts as an outright prohibition of a registered person from acting in such a capacity.

Cambridge believes no proscribed period of time should be included here. It should be for a member firm to make a reasonable determination of whether the facts and circumstances surrounding the registered person's conduct or the relationship between the registered person and the customer should allow a registered person, or that person's family member, to occupy such a position.

2. FURTHER GUIDANCE

Cambridge supports the requirement of a reasonableness determination and believes additional scrutiny of such appointments or nomination requests is appropriate. However, Cambridge believes certain factors proposed in this Notice, which FINRA states are to be considered by a member firm when assessing and determining the measure of reasonableness of a registered person's assumption of a position of trust, are overly broad, ambiguous, and generally prohibitive.

Cambridge asks that FINRA clarify its guidance so as to not mandate all of the criteria which FINRA expressed that member firms consider when evaluating the nomination or appointment of a registered person to a position of trust or to a beneficial interest. Such a comprehensive review may not be proper in all circumstances. Cambridge requests that these factors be more narrowly tailored and reflective of a member firm's business role. For example, it is neither appropriate nor reasonable to obligate a member to determine whether a customer suffers from some impairment that would compel rejection of the customer's express nomination. Such assessment is properly left to a qualified medical professional.

Similarly, compelling a member to determine the existence of "**any** indicia of customer vulnerability or undue influence" (emphasis added), creates a new standard beyond that which a member firm already employs in effort to protect vulnerable clients. Such a standard would create an enormous burden, requiring the member to engage in a subjective analysis of the facts and circumstances supplied to it, as well as to engage in an independent investigation of that information, in order to render a finding on the validity of the customer's actions. Member firms do not have the staff, experience, or frame of reference to fulfill such an investigatory role and should not be held to a greater standard than that which is already in place under other FINRA rules.

In contrast to the current proposal, these criteria should be characterized as *among those* that might evidence the reasonableness of the member's review, as opposed to being deemed mandatory. Instead of creating new standards of conduct and review, Cambridge recommends FINRA rely on those that already exist, such as Rule 2010 which mandates a high standard of commercial honor as well as just and equitable trade principles. Observance of the standards already in place allow member firms to determine for themselves whether the conduct of their registered persons rises to a level of misconduct or whether a conflict of interest exists.

In closing, Cambridge encourages FINRA to consider the opinions noted above, and asks that FINRA amend this proposed rule to actually place more of the authority to determine whether a registered persons engagement in any of the activities contemplated by this proposed new rule would be reasonable, appropriate, or otherwise in the hands of member firms.

Cambridge would be happy to further discuss any of the comments or recommendations in this letter with FINRA.

Respectfully submitted,

// Seth A. Miller

Seth A. Miller
General Counsel
Executive Vice President, Chief Risk Officer

January 10, 2020

VIA E-MAIL ONLY

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506
E-mail: pubcom@finra.org

Re: FINRA Comment Letter

Dear Ms. Mitchell:

I am submitting this letter on behalf of myself and Silver Law Group. For over twenty years, I have dedicated myself to representing investors in FINRA arbitration claims. I am an active member of PIABA and the Co-Chair of the Securities and Investment Fraud Group of the American Association of Justice. My full bio is available on www.silverlaw.com. Over the course of my career, I have seen countless examples of elder financial abuse by FINRA registered financial advisors. My office represents many families in claims against small and large brokerage firms involving cases of financial advisors breaching a relationship of trust or fiduciary duty. We have handled multiple cases involving financial advisors who improperly serve as an executor or beneficiary of an estate.

FINRA's monthly report of disciplinary actions reveals innumerable examples of brokers improperly borrowing money from customers, wrongly convincing seniors to invest in outside investments or urging customers to make the advisor a beneficiary or trustee of an estate. Elder financial abuse is a growing problem in the United States. For example, we recently represented an elderly woman ("Flossie") with no local family. As Flossie's health deteriorated, a court order Guardian was appointed to help with her affairs. The Guardian was shocked to discover that a year earlier, Flossie's financial advisor coordinated with a lawyer to re-write Flossie's will making the financial advisor the beneficiary of her estate to the exclusion of Flossie's own son. Moreover, the financial advisor had already taken control of Flossie's checking account and was using her money for his personal expenses. As an independent financial advisor, the brokerage firm's supervisory system over the advisor was very lax. Ultimately, we were able to work with the Guardian to reverse the improperly executed estate documents and recover damages. Unfortunately, most victims are not going to have a guardian to help identify problems, leaving the door open for unscrupulous brokers to take advantage of these vulnerable individuals without the knowledge of victims' families, friends, or the brokerage firm.

The rule properly recognizes that a registered person's "immediate family" may make a registered person a part of an estate. Beyond this personal relationship, it is irrational to allow a registered person to become the executor or beneficiary of a customer's estate. However, the

proposed rule raises more ills than it seeks to cure. A family should not discover after the fact that a trusted professional improperly inserted themselves into an estate causing unnecessary emotional damage and financial burdens on the family.

Wall Street fought hard to win the battle defeating the fiduciary duty rule. It should not be allowed to become the fiduciary to an estate after a client passes on.

If a financial advisor disavows prior knowledge of being designated a trustee or beneficiary of an estate, a negative inference should immediately attach to the designation. And, if it is discovered that the financial advisor played a role in being appointed, FINRA rules should allow for some severe sanctions against the advisor.

We are in the midst of the largest generational transfer of wealth in history. There are an increasing number of opportunities for brokers who already stand in a position of trust with their customers to commit elder financial abuse, and the financial motivations to do so will only increase. It is imperative that stronger regulations are put in place to counter these factors.

I applaud FINRA for addressing this important issue. As an attorney who handles many elder financial fraud cases, I believe this is a growing problem that needs to be addressed.

Respectfully submitted,

Scott L. Silver
ssilver@silverlaw.com

SLS/rf

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

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

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

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

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

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

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

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

Bill Singer's resume at http://rrbdlaw.com/bios_singer.html [rrbdlaw.com]
Phone: 917-520-2836
Email: rrbdlawyer@gmail.com

Hi, I appreciate what the intent of the rule is, however this rule would put a lot of elderly people who have one without any ways to distribute there estate. I had one person have their handyman as the trustee,Why??? Because she can't have her advisor as the trustee??? the money is going to non-profits. I believe this rule would be irresponsible on firna behalf.

VIA ELECTRONIC MAIL

January 10, 2020

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 19-36 – Registered Person Being Named a Customer's Beneficiary or Holding a Position of Trust for a Customer

Dear Ms. Piorko Mitchell:

On November 11, the Financial Industry Regulatory Authority (FINRA) published its request for public comment on a proposed rule to limit a registered person from being named a customer's beneficiary or holding a position of trust for or on behalf of a customer (Proposed Rule).[1] The Proposed Rule would prohibit a registered person from being named a beneficiary or receiving a bequest from a customer's estate, or holding a position of trust on behalf of a customer who is not an immediate family member, unless the registered person provides written notice and receives written approval from their firm.

The Financial Services Institute[2] (FSI) appreciates the opportunity to comment on this important proposal. FSI and its members are committed to preventing the financial abuse and exploitation of vulnerable adults and support the safeguards established by the Proposed Rule. We offer more detailed supportive feedback below.

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 US, there are more than 160,000 independent financial advisors, which account for approximately 52.7 percent of all producing

[1] Regulatory Notice 19-36, FINRA Requests Comment on a Proposed Rule to Limit a Registered Person from Being Named a Customer's Beneficiary or Holding a Position of Trust for or on Behalf of a Customer (November 11, 2019) *available at:* https://www.finra.org/rules-guidance/notices/19-36.

[2] 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.[3] These financial advisors are self-employed independent contractors, rather than employees of the Independent Broker-Dealers (IBD).[4]

FSI's IBD member firms provide business support to independent 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 and job creators with strong ties to their communities. These financial advisors provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations, and retirement plans. Their services include 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 Main Street Americans with the affordable financial advice, products, and services necessary to achieve their investment goals.

FSI members make substantial contributions to our nation's economy. According to Oxford Economics, FSI members nationwide generate $48.3 billion of economic activity. This activity, in turn, supports 482,100 jobs including direct employees, those employed in the FSI supply chain, and those supported in the broader economy. In addition, FSI members contribute nearly $6.8 billion annually to federal, state, and local government taxes. FSI members account for approximately 8.4% of the total financial services industry contribution to U.S. economic activity.[5]

Discussion

FSI appreciates the opportunity to comment on the Proposed Rule. FSI is committed to the prevention of elder financial abuse and has created tools to assist members in identifying and reporting such abuse.[6] FSI and its members support FINRA's efforts to protect vulnerable adults from exploitation and undue influence by bad actors. The Proposed Rule does this by providing appropriate safeguards for firms and financial advisors while providing reasonable carveouts for immediate family members and allowing firms to make reasonable determinations in the case of existing relationships.

Specifically, the Proposed Rule establishes clear parameters for firms and financial advisors to follow. The Proposed Rule would prohibit a registered person from being named a beneficiary or receiving a bequest from a customer's estate or holding a position of trust on behalf of a customer who is not an immediate family member, unless the registered person provides written notice and receives written approval from their firm. Further, the Proposed Rule correctly requires that when acting as an executor or trustee or holding a power of attorney on behalf of a customer, a registered person shall not derive financial gain from acting in such capacity other than from fees and charges that are reasonable and customary for doing so.

The Proposed Rule would also require firms to establish written procedures to comply with the duty to perform a reasonable assessment and determination before approving a financial

[3] Cerulli Associates, Advisor Headcount 2016, on file with author.
[4] The use of the term "financial advisor" or "advisor" in this letter is a reference to an individual who is a registered representative of a broker-dealer, an investment adviser representative of a registered investment adviser firm, or a dual registrant. The use of the term "investment adviser" or "adviser" in this letter is a reference to a firm or individual registered with the SEC or state securities division as an investment adviser.
[5] Oxford Economics for the Financial Services Institute, The Economic Impact of FSI's Members (2016).
[6] FSI's Elder Abuse Prevention Resource Center, available at www.financialservices.org/elderabuse.

advisor's request. This assessment would take into consideration several factors such as: potential conflicts of interest; the length and type of relationship between the financial advisor and customer; whether the facts and circumstances indicate that the customer has a physical or mental impairment; any indication of improper activity, conduct or undue influence; and the size of any bequest relative to the size of the customer's estate. Many firms already have similar policies and procedures in place to protect investors, financial advisors, and the firms themselves. The Proposed Rule clarifies the parameters that should be included in firms' policies and procedures, but appropriately allows member firms the flexibility to tailor the process to their unique business model.

The Proposed Rule appropriately does not penalize advisors who are not aware until a client passes that they have been named a beneficiary but requires them to seek approval once they know they have been named. Financial advisors often form close relationships with longstanding clients. As mentioned above, their strong ties to their communities and neighbors make them uniquely situated to help those clients plan for and achieve their investment goals. Further, financial advisors are often the first to notice signs of possible cognitive decline or elder abuse and are best positioned to report it. Often financial advisors do not know that they have been named a customer's beneficiary. The Proposed Rule appropriately applies when the registered person learns of his or her status. Further, the Proposed Rule allows firms to take into account whether the request involves a long standing friend and does not apply to immediate family members. The Proposed Rule defines 'immediate family' broadly enough that we do not think there will be unintended consequences, however, we suggest that the final definition clarify 'cousin' to mean first cousins only rather than second or more distant cousins.

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) 393-0022.

Respectfully submitted,

Senior Vice President, Policy & Deputy General Counsel

Securities Arbitration Clinic
St. Vincent de Paul
Legal Program, Inc.
8000 Utopia Parkway
Queens, NY 11439
Tel (718) 990-6930

Via Email To pubcom@finra.org
Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street NW
Washington, D.C. 20006-1505

Re: Regulatory Notice 19-36
FINRA Requests Comment on a Proposed Rule to Limit a Registered Person from Being Named a Customer's Beneficiary or Holding a Position of Trust for or on Behalf of a Customer

Dear Ms. Mitchell:

The St. John's University School of Law Securities Arbitration Clinic (the "Clinic") would like to thank you for the opportunity to comment on Regulatory Notice 19-36, in which FINRA requests comment on a proposed rule to limit a registered person from being named a customer's beneficiary or holding a position of trust for or on behalf of a customer. The Clinic is a curricular offering where students represent public investors of limited means in disputes against their investment brokers.[1] Our clients are often seniors who have entrusted their retirement savings to brokers and their firms. We see firsthand what can go wrong when that trust is violated.

In summary, FINRA proposes to adopt Rule 3241, which seeks to limit a registered person from being named a customer's beneficiary or from holding a position of trust for or on

[1] For more information, please see http://www.stjohns.edu/law/securities-arbitration-clinic.

behalf of a customer. Under this proposed rule, a registered person could only hold a position of trust for or on behalf of a customer if the broker does not gain financial benefits from the position of trust, except for reasonable fees that are customary, and if the registered person also obtains approval from their member firm.

As a result, Rule 3241 would require member firms to conduct a reasonable analysis of the potential risks created by a registered person acting in a position of trust and to reasonably determine whether a registered person should be approved to hold such a position. Additionally, member firms would be required to have written procedures to comply with Rule 3241 and to keep all records of approvals granted under this rule for at least three years following the termination of a registered person acting in a position of trust.

This rule is an effort by FINRA to protect investors from abusive and predatory practices that may arise from a broker being appointed to a position of trust and then abusing that position by taking advantage of the relationship between the broker and the investor. The Clinic is greatly concerned with brokers gaining the trust of their customers and then abusing that trust by being appointed as a beneficiary, trustee, or power of attorney. Therefore, the Clinic applauds FINRA's efforts to increase investor protection through Rule 3241.

The Clinic not only supports Rule 3241 because it would mitigate harm caused by brokers abusing positions of trust, but also because the Clinic believes member firms are in the best position to identify and prevent this type of harm, since member firms have the capability to evaluate, monitor, and restrict their broker's conduct.

FINRA has taken other steps to prevent misconduct that may arise from brokers holding positions of trust. Thus, Rule 3241 is just another step to further address potential misconduct in this area. However, the Clinic believes FINRA should further expand or take even further steps beyond Rule 3241 to ensure investor protection. For example, the Clinic has seen brokers obtain positions of trust with customer shortly after being terminated by their firms. For example, one broker was named as a power of attorney over the customer's accounts after he had been terminated by the firm. Others have obtained other authorization to access and trade the customer's accounts, sometimes investing the customer's funds in fraudulent schemes. The Clinic understands that investors have access to BrokerCheck to get information about brokers, including their employment status and reason for termination. However, most investors still do not know about BrokerCheck or what BrokerCheck does. Therefore, the brokers themselves or their prior firms are the customers' primary source of information. Most firms will not disclose information pertaining to the termination of brokers, likely because of concerns about potential liability.

When a broker is terminated for cause, that information should be made known to clients, without the client having to do their own due diligence through BrokerCheck. Moreover, if the firm receives notification that a customer has appointed a terminated broker to a position of trust, the firm should be obligated to affirmatively disclose to the customer the reason for the broker's termination. Thus, the Clinic believes FINRA should expand Rule 3241

or propose additional rules that would require member firms to disclose termination information to investors who may continue to rely on that individual.

In conclusion, the Clinic supports FINRA's proposal as an additional means of addressing abusive and predatory actions by brokers in positions of trust. The steps proposed by FINRA will help ensure that investors are protected and that their relationship of trust with their broker is not abused. However, the Clinic encourages FINRA to consider additional amendments that would require member firms to disclose information about a broker's employment status and reason for termination that would otherwise be available on BrokerCheck.

Thank you for the opportunity to comment on these important proposals.

Respectfully Submitted,

/s/
Drake Wilson
Legal Intern

/s/
Christine Lazaro, Esq.
Director of the Securities Arbitration Clinic
and Professor of Clinical Legal Education

EXHIBIT 5

Exhibit 5 shows the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

* * * * *

3000. SUPERVISION AND RESPONSIBILITIES RELATING TO ASSOCIATED PERSONS

* * * * *

3200. RESPONSIBILITIES RELATING TO ASSOCIATED PERSONS

* * * * *

3241. Registered Person Being Named a Customer's Beneficiary or Holding a Position of Trust for a Customer

(a) Obligations of the Registered Person

(1) A registered person shall decline being named a beneficiary of a customer's estate or receiving a bequest from a customer's estate upon learning of such status unless one of the following conditions is satisfied:

(A) The customer is a member of the registered person's immediate family; or

(B) Upon learning of such status, the registered person provides written notice describing the proposed status to the member with which the registered person is associated, in such form as specified by the member, and receives written approval from that member of such status prior to being named a beneficiary of a customer's estate or receiving a bequest from a customer's estate. If the member disapproves the status or places conditions or limitations on it, the registered person shall not assume such status or shall comply with such conditions or limitations.

(2) A registered person shall decline being named as an executor or trustee or holding a power of attorney or similar position for or on behalf of a customer upon learning of such status unless one of the following conditions is satisfied:

(A) The customer is a member of the registered person's immediate family; or

(B) Upon learning of such status, the registered person provides written notice describing the position and the person’s proposed role to the member with which the registered person is associated, in such form as specified by the member, and receives written approval from that member of such status prior to acting in such capacity or receiving any fees, assets or other benefit in relation to acting in such capacity; and

(i) The registered person does not derive financial gain from acting in such capacity other than from fees or other charges that are reasonable and customary for acting in such capacity; and

(ii) If the member disapproves the position or places conditions or limitations on it, the registered person shall not act in such capacity or shall comply with such conditions or limitations.

(b) Obligations of a Member Receiving Notice

(1) Upon receipt of a written notice as described in Rule 3241(a), a member shall:

(A) Perform a reasonable assessment of the risks created by the registered person’s assuming such status or acting in such capacity, including, but not limited to, an evaluation of whether it will interfere with or otherwise compromise the registered person’s responsibilities to the customer; and

(B) Make a reasonable determination of whether to approve the registered person's assuming such status or acting in such capacity, to approve it subject to specific conditions or limitations, or to disapprove it.

(2) Upon completion of the member's assessment, a member shall advise the registered person in writing whether the member:

(A) Approves the person's assuming such status or acting in such capacity and imposes any conditions or limitations on the person's holding the position; or

(B) Disapproves the person's assuming such status or acting in such capacity.

(3) If the member imposes conditions or limitations on its approval of the person's assuming such status or acting in such capacity, the member shall reasonably supervise the registered person's compliance with such conditions or limitations.

(4) A member shall establish and maintain written procedures to comply with the requirements of paragraph (b) of this Rule.

(c) Definition of Immediate Family

The term "immediate family" means parents, grandparents, mother-in-law or father-in-law, spouse or domestic partner, brother or sister, brother-in-law or sister-in-law, son-in law or daughter-in-law, children, grandchildren, cousin, aunt or uncle, or niece or nephew, and any other person who resides in the same household as the registered person and the registered person financially supports, directly or indirectly, to a material extent. The term includes step and adoptive relationships.

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

.01 Customer. For purposes of this Rule, a "customer" would include any customer that has, or in the previous six months had, a securities account assigned to the registered person at any member.

.02 Estate. For purposes of this Rule, a customer's estate would include any cash and securities, real estate, insurance, trusts, annuities, business interests and other assets that the customer owns or has an interest in at the time of death.

.03 Record Retention. For purposes of paragraph (b) of this Rule, members shall preserve the written notice and approval for at least three years after the date that the beneficiary status or position of trust has terminated or the bequest received or for at least three years, whichever is earlier, after the registered person's association with the member has terminated.

.04 Position Prior to Association With Member. If a registered person was named as a beneficiary or to a position of trust prior to the registered person's association with the member, the registered person, within 30 calendar days of becoming so associated, shall provide notice to and receive approval from the member consistent with this Rule to maintain the beneficiary status or position of trust.

.05 Pre-Existing Positions. With respect to agreements to assume such status or act in such capacity that were entered into prior to the existence of a broker-customer relationship, such as where the customer was not a customer of the registered person at the time at which the registered person was named beneficiary or to a position of trust, these agreements raise similar conflict of interest concerns as agreements to assume such status or act in such capacity entered into subsequent to the existence of a broker-customer relationship. Therefore, the registered person must act consistent with paragraph (a) of this Rule for any existing beneficiary status or position of trust prior to the initiation of the broker-customer relationship. Moreover, upon

receipt of notice of such a position, the member should evaluate the beneficiary status or position of trust consistent with paragraph (b) of this Rule.

.06 Naming Other Persons. A registered person instructing or asking a customer to name another person to be a beneficiary of the customer's estate or to receive a bequest from the customer's estate would present similar conflict of interest concerns as the registered person being so named. Accordingly, a registered person instructing or asking a customer to name another person, such as the registered person's spouse or child, to be a beneficiary of the customer's estate or to receive a bequest from the customer's estate would not be consistent with paragraph (a)(1) of the Rule.

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