

MEMO# 30388

November 8, 2016

SEC Publishes for Comment FINRA's Proposed Rule to Address Senior Exploitation; Comments Requested by November 18

[30388]

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TO: Broker/Dealer Advisory Committee

Principal Underwriters Working Group

Transfer Agent Advisory Committee RE: SEC Publishes for Comment FINRA's Proposed Rule to Address Senior Exploitation; Comments Requested by November 18

Background

As you may recall, in October 2015, FINRA proposed for comment rule amendments that were designed to protect senior and vulnerable account holders from financial exploitation.^[1] The proposal would accomplish this by: (1) requiring members to make reasonable efforts to obtain the name and contact information for a “Trusted Contact Person” for each customer’s account; and (2) permit members to place a temporary hold on disbursements from an account if the broker-dealer reasonably believed the owner of the account was the subject of financial exploitation. While the Institute supported FINRA’s interest in protecting senior and vulnerable adults from financial exploitation, we were concerned with the proposal as drafted and noted that it was inconsistent with a model law and model rules adopted by the North American Securities Administrators Association (NASAA). The Institute’s comment letter recommended that FINRA conform its proposal to NASAA’s.

Based on the comments it received on its proposal, FINRA revised it to address commenters’ concerns and filed a revised version with the Securities and Exchange Commission (SEC). On November 1, the SEC published the revised version for comment.^[2] The revised version is briefly summarized below. Comments are due to the SEC by November 28. Because FINRA’s revisions to the proposal address the concerns raised in our previous comment letter and conform its rules to NASAA’s, we are expecting to file a comment letter supporting adoption of the proposed rule revisions. If there are any issues you recommend the Institute address in our comment letter, **please provide them to the undersigned by email (tamara@ici.org) no later than Friday, November 18.**^[3]

FINRA's proposal consists of revisions to Rule 4512, relating to Customer Account Information, and creation of a new rule, Rule 2165, relating to Financial Exploitation of Specified Adults, each of which is summarized below.

Revisions to Rule 4512

FINRA proposes to revise Rule 4512 to require each member to maintain, as part of its customer account information for non-institutional accounts, the "name and contact information for a trusted contact person age 18 or older who may be contacted about the customer's account." Proposed Supplementary Material .06 clarifies that the absence of the name of or contact information for a trusted contact person "shall not prevent a member from opening or maintaining an account for a customer, provided that the member makes reasonable efforts to obtain the name of and contact information for a trusted contact person." According to this Supplementary Material, at the time an account is opened, a broker-dealer shall disclose in writing to the customer that the member or an associated person of the member is authorized to contact the trusted contact person and disclose information about the account to address possible financial exploitation, to confirm the specifics of the customer's contact information, health status, or the identity of any legal guardian, executor, trustee, or holder of a power of attorney. For existing accounts, the broker-dealer shall provide this disclosure in writing when updating the customer's account information.

Proposed New Rule 2165

Proposed new Rule 2165 would enable a FINRA member to put a temporary hold on disbursements from a customer's account in the event the member reasonably believes that financial exploitation of a "specified adult" has occurred, is occurring, has been attempted, or will be attempted. Pursuant to the proposed rule:

A Specified Adult is a natural person age 65 or older or a natural person age 18 or older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interest;

A Trusted Contact Person is the person named on the customer's account pursuant to Rule 4512; and

Financial Exploitation, generally speaking, is: the wrongful or unauthorized appropriation of a Specified Adult's account; obtaining control, through deception, intimidation, or undue influence of a Specified Adult's money, assets, or property; or the conversion of a Specified Adult's money, assets, or property.

The rule authorizes a member to place a temporary hold on disbursements from a Specified Adult's account if the member reasonably believes that financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted and within two days after the date of the hold, the broker-dealer provides notification orally and in writing, which may be electronic, of the temporary hold and the reason for it to all parties authorized to transact business on the account. Notice must also be provided to the Trusted Contact Person unless such person is unavailable or is involved in the exploitation. The broker-dealer must also immediately initiate an internal review of the facts and circumstances that caused it to reasonably believe that financial exploitation was attempted or is occurring.

A temporary hold shall expire not later than 15 business days after it began unless sooner terminated or extended by a state regulator or agency of competent jurisdiction, a court of

competent jurisdiction, or the member. The member may extend the hold for no longer than 10 business days provided that its internal review of the fact and circumstances supports the broker-dealer's reasonable belief regarding the financial exploitation.

Members that place a temporary hold on disbursements from an account in reliance on Rule 4512 must establish and maintain written supervisory procedures reasonably designed to achieve compliance with the rule and must maintain records documenting compliance with the rule's requirements. The member's procedures under the rule shall also identify the title of each person authorized to place, terminate, or extend a temporary hold on behalf of the member. Such person must be an associated person of the member who serves in a supervisory, compliance, or legal capacity for the member.

Supplementary Material associated with the rule clarifies that the rule "does not require a member to place temporary holds on disbursements of funds or securities" of a Specified Adult's account. Instead, the rule is intended to provide a safe harbor for those members that exercise discretion in imposing temporary holds. The Supplementary Material also requires a member relying on the rule to develop and document training policies or programs reasonably designed to ensure that associated persons comply with the requirements of the rule. Finally, the Supplementary Material provides that a member's reasonable belief that a natural person age 18 and older has a mental or physical impairment that renders the individual unable to protect his or her own interests may be based on the facts and circumstances observed in the member's business relationship with the natural person.

Tamara K. Salmon
Associate General Counsel

endnotes

[1] See Financial Exploitation of Seniors and Other Vulnerable Adults, FINRA Notice 15-37 (October 2015), which is available at: https://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-15-37.pdf.

[2] See Notice of Filing of a Proposed Rule Change to Amend Rule 4512 (Customer Account Information) and Adopt FINRA Rule 2165 (Financial Exploitation of Specified Adults), SEC Release No. 34-79215; File No. SR-FINRA-2016-039, which is available through the SEC's website at: <https://www.sec.gov/rules/sro/finra.shtml>. [The rule text can be found in Exhibit 5 at pp. 412-418.]

[3] Due to the short comment period provided on the proposal, the Institute is not expecting to circulate a draft of its comment letter prior to filing it, though the final letter will be provided to members.