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November 28, 2016

By Electronic Mail (rule-comments@sec.gov)

Brent J. Fields
Secretary
U.S. Securities & Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: File No. SR-FINRA-2016-039: 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)

Dear Mr. Fields:

Thank you for the opportunity to submit these comments on the proposed amendments to Financial Industry Regulatory Authority ("FINRA") Rule 4512 and new Proposed Rule 2165 (the "Proposed Rules") on behalf of the Securities Industry and Financial Markets Association ("SIFMA").[1] SIFMA appreciates the work that both FINRA and the SEC have undertaken in order to protect senior and vulnerable adults from financial exploitation, and we strongly believe that the Proposed Rules will provide FINRA member firms with important tools to combat this rising threat.

Financial exploitation of senior and vulnerable adults is a serious issue that has impacts that are destructive at both the individual and national levels. In individual instances of exploitation, seniors may lose the entirety of their retirement savings to bad actors, leaving them unable to maintain their independence or pay for their own healthcare – not to mention the added stress, significant health impacts, and often the loss of important relationships. At a national level, seniors lose an estimated $2.9 billion every year in cases of financial exploitation reported by media outlets, while only an estimated 1 in 44 cases are even reported to authorities. While no one has yet been able to estimate the precise impact of financial exploitation on the national economy, there is no doubt that the impact is extensive. An additional challenge is that often the bad actor is a family member, friend or caregiver of their victim – in fact, a July 2016 study in New York State found that 67% of verified cases of financial exploitation were committed by family members.

[1] SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $20 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

Fortunately, the financial services sector is in a position to work with its regulators to combat and mitigate the damage caused by this practice. We commend FINRA for advancing a well-thought-out proposal that provides its member firms important tools to protect their senior and vulnerable clients. We have some suggestions to the SEC and FINRA to further improve this proposal:

I. Provide an Exception from Contacting "All Parties Authorized to Transact Business on the Account" When the Member Reasonably Suspects a Party of Financial Exploitation or When Certain Parties are Unavailable

Under Proposed Rule 2165(b)(1)(B)(i), when a FINRA member places a temporary hold on a disbursement, the member is required to notify "all parties authorized to transact business on the Account […]" of both the hold and the reason for the temporary hold, regardless of whether those parties are the suspected perpetrator of the financial exploitation. The industry has concerns that notifying the suspected perpetrator could lead to increased risk for the Specified Adult, especially in cases where financial abuse is being carried out alongside physical abuse.

In fact, FINRA has already recognized this concern by providing an exception from the mandate to reach out to a Trusted Contact Person when said person is the suspected perpetrator of the abuse.

Similarly, there is concern among broker-dealers that the Safe Harbor still appears to be predicated on actual notice of "all parties authorized to transact business on the account," regardless of their availability. While this concern was addressed by FINRA in both page 54 of SR-FINRA-2016-039 and in Proposed Rule 2165(b)(1)(B)(ii) (the Trusted Contact portion of the requirement), the concern persists for the "all parties" portion of the requirement.

As such, we ask that the following language be added to Proposed Rule 2165(b)(1)(B)(i):

"(i) all parties authorized to transact business on the Account, except for those parties that are unavailable or that the member reasonably believes has engaged, is engaged, or will engage in the financial exploitation of the Specified Adult; and"

II. Adjust the Limits on Staff Members Able to Place a Temporary Hold to Allow for Flexibility in Business Size and Business Model, and Conformity with Promising Practices

First, we would like to express our support for FINRA's decision to focus the Proposed Rules on the actions of its member firms, as opposed to individuals working within the industry; a change that was made between FINRA Regulatory Notice 15-37 and SR-FINRA-2016-039. We also fully support FINRA's efforts to ensure that a temporary hold is placed, terminated or extended after elevation to an individual with the appropriate authority.[2]

However, under Proposed Rule 2165(c)(2), only "an associated person of the member who serves in a supervisory, compliance or legal capacity for the member" is permitted to place, terminate or extend a temporary hold on behalf of the member firm. Industry members are concerned that this language unnecessarily prohibits certain personnel with the appropriate authority from acting in the scope of their regular duties.

[2] SR-FINRA-2016-039, Pg. 13, FN 29.

For example, many firms, in implementing promising practices to protect their senior clients, have designated units to review cases related to Specified Adults and those units are often housed within a broker-dealer's business unit (as opposed to their legal or compliance units). Moreover, the staff designated to review such cases are not always designated as "Supervisors" within the firm, despite being 'higher up' in the escalation process. Broker-dealers are concerned that this language would unnecessarily preclude some firms from implementing the most effective and efficient review processes for their size or business model, or cause them to have to change their escalation and review structure which has already been implemented and is working successfully. While these 'non-Supervisors' may be acting in a 'supervisory capacity,' we believe that clarifying language is necessary to remove any opacity and encourage firms to implement efficient and effective dedicated review teams. As such, we ask that Proposed Rule 2165(c)(2) read as follows:

"[…] Any such person shall be an associated person of the member who serves in a supervisory, compliance or legal capacity for the member or who has been designated by the member to review cases involving Specified Adults as part of the member's escalation process."

III. Add FINRA Rule 4530 to Proposed Rule 2165.01 (Applicability of Rule) and Protect Associated Persons from Retaliatory Complaints

SIFMA thanks FINRA for providing clarity regarding the proposed safe harbor by providing a list of specific FINRA Rules in the relevant supplementary materials, and requests the addition of Rule 4530 to this list. SIFMA recognizes that FINRA addressed the inclusion of FINRA Rule 4530 in Proposed Rule 2165.01 on page 28 of SR-FINRA-2016-039. However, SIFMA strongly urges both the SEC and FINRA to reconsider this matter, as well as provide expanded relief against retaliatory complaints for those who act in full compliance with Proposed Rule 2165.

Currently, the threat of a customer complaint is one of the most effective tools that savvy bad actors have in their arsenal, which allows the bad actor to potentially levy a serious threat to an advisor's livelihood. By not protecting associated persons taking protective action under Proposed Rule 2165 from retaliatory complaints, FINRA would be providing these bad actors with significant leverage over associated persons, or force associated persons who acted in their client's best interest to go through a lengthy and difficult expungement process to remove the complaint from their record. As such, SIFMA respectfully requests that FINRA add language to Proposed Rule 2165.01 stating that good faith compliance with Proposed Rule 2165 does not constitute a "sales practice violation" for the purposes of Form U-4/U-5 reporting, and that such retaliatory complaints are not publicly reportable under FINRA Rule 8312 (BrokerCheck Disclosure).

Similarly, SIFMA requests that Rule 4530 be added to Proposed Rule 2165.01 to avoid regulatory inquiries (and the related underlying reporting requirements) that are unnecessary, costly and burdensome for both FINRA and its member firms.

IV. Permit Voluntary Outreach to a Trusted Contact Person When a Hold is Placed

Currently, under Proposed Rule 2165(b)(1)(B)(ii), a FINRA member firm is required to notify the trusted contact when a temporary hold is placed on a disbursement. While we commend FINRA for accounting for situations when a Trusted Contact Person may be unavailable, SIFMA is still concerned about procedural issues that this mandatory outreach may create.

Specifically, there are numerous situations in which a Trusted Contact Person may not be the appropriate person to receive such outreach – even more so if the Specified Adult has other parties authorized to transact business on their account, or has given written permission to contact other parties through means other than the dedicated Trusted Contact form. Often, a Trusted Contact will be the person with the most limited authority; in these cases, firms are concerned that outreach to a Trusted Contact may inhibit or delay the resolution of the situation. This can be particularly true in situations where the individual is unaware of their status as a Trusted Contact and an extensive level-setting conversation would be required. In addition to unnecessary delay, such a requirement could create duplicative obligations (and accompanying record-keeping burdens), when an issue can be resolved relatively quickly by contacting the client's power of attorney.

Moreover, because the client provides written permission to speak with the Trusted Contact, any contact would fit within existing federal privacy exceptions. As such, SIFMA respectfully requests that any outreach to a Trusted Contact remain voluntary.

V. Provide Longer Time Periods to Contact All Parties Authorized to Transact Business on an Account

Similar to the above, there is concern among broker-dealers that, for many accounts, the two business day time period allotted to contact all parties authorized to transact business on the account and any Trusted Contact Person(s)[3] is too short. Generally, this concern is due to the procedural difficulties firms face in contacting all required parties (particularly if the firm must attempt to exhaust all contact methods for each party per the discussion on unavailable Trusted Contacts on pg. 54 of SR-FINRA-2016-039), and complying with other similar requirements (i.e., state reporting requirements) within that same timeframe. As such, SIFMA respectfully requests an extension to this time period; even a one or two business day extension could provide significant relief.

VI. Clarify Language in Proposed Rule 2165(b) Concerning When a Hold May be Extended and Whether the Safe Harbor Would Apply During Such Extensions or Early Termination

Under Proposed Rule 2165(b)(3), a FINRA member firm may place a temporary hold on a disbursement for up to 25 business days when certain criteria are met, unless the hold is "sooner terminated or extended by a state regulator or agency of competent jurisdiction or a court of competent jurisdiction." SIFMA commends FINRA for recognizing the important role played by investigating agencies, specifically state securities regulators, and the importance of flexible time periods when dealing with the financial exploitation of Specified Adults. However, there is concern that, as currently drafted, 2165(b)(3) could be read to require the shortening/extension of the delay by the competent regulator, agency or court <u>prior</u> to the initial hold being extended for an additional 10 business days. As such, SIFMA suggests changing "sooner" to "otherwise" in 2165(b)(3) to clarify the matter, so the sentence would read as, "[…] unless <u>otherwise</u> terminated or extended by a state regulator or agency of competent jurisdiction or court of competent jurisdiction."

Further, given the discussion from FINRA regarding a firm's ability to place a disbursement hold beyond the limits of the Proposed Rules (thereby losing the safe harbor),[4] SIFMA requests confirmation that the Safe Harbor would still apply if the hold was extended by a court, state

[3] Proposed Rule 2165(b)(1)(B).
[4] SR-FINRA-2016-039, pg. 46.

securities regulator or agency, and that the Safe Harbor would similarly apply after a firm releases a disbursement if the hold was terminated by a court, state securities regulator or agency, or by a member firm which determined, in good faith, that a reasonable suspicion of financial exploitation was not supported by their review of the facts and circumstances.

VII. Provide Clarification Regarding the Applicability of Proposed Rule 4512.06 to Certain Automated or User-Driven Processes

Under Proposed Rule 4512.06(c), a FINRA member firm would be required to "make reasonable efforts to obtain or, if previously obtained, to update where appropriate the name of and contact information for a trusted contact person consistent with the requirements of SEA Rule 17a-3(a)(17)." As drafted, there is currently confusion among member firms regarding how this requirement would specifically apply to automated Rule 17a-3(a)(17) compliance processes, or tech platforms that permit a client to voluntarily change the relevant information at their convenience. For example, would a member firm be required to attempt to obtain or update trusted contact information when a client, of their own volition, makes voluntary changes to information covered by 17a-3(a)(17) online without any involvement from a representative? SIFMA suggests that FINRA provide additional clarification on this aspect of the Proposed Rules, exempt automated online processes that do not lend themselves to collecting information such as that, and confirm that the Proposed Rules would only require a firm to attempt to obtain or update the relevant Trusted Contact information once per every 36-month period.

VIII. Provide Firms with More Time to Implement the Proposed Rules

Under the Proposed Rules, FINRA members would have 6 months to implement any new requirements. There is serious concern among broker-dealers that 6 months is an insufficient time period to make all of the necessary adjustments to their internal systems. Notably, for many of the firms that put the Trusted Contact Forms in place prior to the release of FINRA Regulatory Notice 15-37, full implementation of the form took over 1 year – and sometimes over 2 years. Moreover, there are currently other significant changes happening within the industry that would be competing for the same firm resources as the Proposed Rules. These changes include, but are not limited to, implementation of the U.S. Department of Labor's new fiduciary rule, the implementation of T+2, FINRA and MSRB fixed income confirmation changes, the SEC's Consolidated Audit Trail, and FinCEN's Customer Due Diligence Rule.

Each of these projects will require notable IT, client education and compliance resources, among others, to ensure a smooth transition, and firms – regardless of size – only have so many programmatic changes that they can implement simultaneously. For this reason, SIFMA requests an implementation period of up to 18 months, but no shorter than 12 months, for the Proposed Rules.

IX. Account for Privileged Information, Including Work Product, in Proposed Rule 2165(d)

Under Proposed Rule 2165(d), FINRA member firms would be required to retain certain records, including "[…] the internal review of the facts and circumstances pursuant to paragraph (b)(1)(C) of this Rule," which would be required to be "readily available to FINRA, upon request." SIFMA is concerned that the current language would appear to potentially include privileged information, such

as attorney work product, in the set of documents that must be retained for FINRA review – a requirement that would be outside the scope of FINRA's authority. In order to clarify this issue, SIFMA suggests adding the following language:

"[…] (5) a summary of the internal review of the facts and circumstances pursuant to paragraph (b)(1)(C) of this Rule, not including any privileged or otherwise legally protected records."

Opportunities for Future Collaboration

SIFMA thanks you for working with the industry to combat the scourge of financial exploitation. We believe that this proposal is a strong first step in addressing this terrible issue, and we look forward to continuing to work both the SEC and FINRA to further implement important investor protections.

For instance, SIFMA believes that it is imperative that the protections of the Proposed Rules be expanded to include temporary holds on transactions, in addition to disbursements. While placing a hold on disbursements allows firms to mitigate the most readily apparent consequences of financial exploitation, Specified Adults can still face significant negative impacts from both underlying and stand-alone transactions. Exploitative transactions can trigger significant tax consequences (i.e., due to the liquidation of certain securities), fees or other negative financial implications for the Specified Adult. Moreover, a bad actor (for instance, someone misusing a power of attorney) may be able to use their position to undertake trading schemes for their benefit, at the cost of the Specified Adult's interests, exposing the client to significant financial losses (such as new investments in options or penny stocks).

Other examples of exploitative, non-disbursement transactions include: the buying of an investment product for the benefit of the wrongdoer, a change in ownership of an account, a change in the beneficiary of an account, and the incursion of penalties due to another change in the account (such as annuity-related surrender charges). For these reasons, SIFMA was heartened by FINRA's willingness to explore such an expansion of the safe harbor[5] and looks forward to working to make that expansion a realty.

Similar to the threat of financial exploitation, cognitive decline (including diminished capacity) is a growing problem that the financial services industry must be able to confront, head-on, as soon as possible – especially considering the fact that leading aging scientists have demonstrated that otherwise healthy adults can see a decline in the ability to make financial decisions as part of the "normal" aging process. Even more than financial exploitation, the threat of cognitive decline is both expansive and difficult to address, and the industry and regulators will need to continue to work together to develop effective solutions to address this side of the aging coin.

Finally, SIFMA firmly believes that further action is still necessary to address transfers performed through the Automated Customer Account Transfer Service (ACATS). So often, the initiation of an ACATS transfer is a bad actor's first step towards financial exploitation, and the gap between the ACATS rules and the Proposed Rules leaves room for these exploiters to act. In an effort to fully address financial exploitation, this gap needs to be closed; one solution to this issue could be linking the ACATS rules with the Proposed Rules. SIFMA looks forward to the opportunity to further pursue such solutions with FINRA and the SEC.

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[5] SR-FINRA-2016-039, pg. 40.

Once again, SIFMA thanks you for the opportunity to submit these comments. If there is any further information or other assistance that we may be able to provide, or if there are any questions we may be able to answer, please contact me at [redacted] or [redacted] or Kyle Innes at [redacted] or [redacted].

Sincerely,

Lisa Bleier
Managing Director and Associate General Counsel
SIFMA
[redacted] | [redacted]