



NASAA

NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

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November 28, 2016

Submitted electronically to rule-comments@sec.gov

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

RE: Release No. 34-79215; File No. SR-FINRA-2016-039

Dear Mr. Fields:

On behalf of the North American Securities Administrators Association, Inc. (“NASAA”),¹ I hereby submit the following comments in response to Release No. 34-79215; File No. SR-FINRA-2016-039, entitled 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) (“Proposal”).² NASAA appreciates the opportunity to offer its comments in response to the Proposal.

Protecting senior investors from financial exploitation has long been a strong priority of NASAA members. A cornerstone of NASAA’s recent work to protect senior investors has been the adoption of NASAA’s Model Act to Protect Vulnerable Adults from Financial Exploitation (“Model Act”). The Model Act is a significant part of the work of NASAA’s Committee on Senior Issues and Diminished Capacity (“Seniors Committee”), formed in 2014, which is charged with developing initiatives to protect senior investors. These initiatives began with the launch of NASAA’s Senior Investor Resource Center in 2003 and include, among other things, the adoption of a model rule on the use of senior-specific certifications and professional designations in 2008. Since 2014, NASAA’s Seniors Committee, working with other NASAA Section Committees and Project Groups, has worked to adopt the Model Act, launch a website containing information with links to important resources (www.serveourseniors.org), and develop the “SeniorSafe” Training Program. The “SeniorSafe” Training Program is administered

¹ NASAA is the association of the 67 state, provincial, and territorial securities regulatory agencies of the United States, Canada, and Mexico. NASAA serves as the forum for these regulators to work with each other in an effort to protect investors at the grassroots level and to promote fair and open capital markets.

² 81 Fed. Reg. 78,238 (Nov. 7, 2016).

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by state securities regulators and designed to help educate broker-dealers and investment advisers on the important issues surrounding senior financial exploitation.

NASAA's Model Act gives industry participants and state regulators new tools to help detect and prevent financial exploitation of vulnerable adults.³ The NASAA Model Act has five key provisions:

- **Mandatory Reporting.** Qualified individuals who reasonably believe that financial exploitation of an eligible adult may have occurred, been attempted, or is being attempted, must promptly notify state Adult Protective Services (APS) and their state securities regulator. During the comment process on the Model Act, some commenters noted that a mandatory reporting requirement could increase reports to state agencies. The number of unsubstantiated reports should be kept to a minimum given the “reasonable belief” standard upon which a report is required to be made.
- **Notification.** The act authorizes disclosure to third parties only in instances where an eligible adult has previously designated the third party to whom the disclosure may be made. Importantly, the Model Act directs that disclosure may not be made to the third party if the qualified individual suspects the third party of the financial exploitation.
- **Delayed Disbursements.** The Model Act provides broker-dealers and investment advisers with the authority to delay disbursing funds from an eligible adult's account for up to 15 business days if the broker-dealer or investment adviser reasonably believes that a disbursement would result in the financial exploitation of the eligible adult. If the broker-dealer or investment adviser delays a disbursement, it must notify people authorized to transact business on the account (unless these individuals are suspected of the financial exploitation) notify the state securities regulator and adult protective services agency, and undertake an internal review of the suspected exploitation. Under the Model Act, the securities regulator or adult protective services agency may request an extension of the delay for an additional 10 business days. Extensions beyond that could be ordered by a court.
- **Immunity.** The Model Act's immunity provisions are applicable to the reporting of suspected financial abuse to governmental agencies, the disclosure of information to designated third parties, and the decision to delay disbursements. These provisions provide immunity from administrative and civil liability for qualified individuals, broker-dealers, or investment advisers who, in good faith and exercising reasonable care, comply with the provisions of the Model Act.
- **Records.** The Model Act requires that broker-dealers and investment advisers comply with requests for information from APS agencies or law enforcement in cases of

³ NASAA Members approved the Model Act in January 2016. Since its approval by NASAA's members, Alabama, Louisiana, Indiana, and Vermont have adopted versions of the model. A number of other states expect to adopt the Model Act in 2017.

suspected or attempted financial exploitation. It further clarifies that the granting of such access shall not be construed to subject the records of the broker-dealer or investment adviser to a state's public records laws.

The NASAA Model Act and the Proposal are each designed to give financial professionals more tools to combat senior financial exploitation, and contain many similar provisions. As the Proposal notes, NASAA offered its comments on FINRA's initial proposal in 2015 encouraging FINRA to make certain adjustments to its proposed rule to better complement NASAA's then-proposed Model Act.⁴ NASAA is supportive of the changes FINRA has implemented from its initial rule proposal to the Proposal now under consideration by the Commission. The Proposal brings many aspects of this regulatory framework more in line with NASAA's Model Act. Specifically, the Proposal and the Model Act now include identical provisions regarding the applicable age (65) and nearly identical provisions regarding the timing of disbursement delays (15-day initial hold, followed by a possible 10-day extension).⁵ Each also allows for temporary delays in disbursements but not holds on transactions, as advocated by some. And, both contain substantially similar definitions of financial exploitation.

NASAA Supports FINRA's Proposed Trusted Contact Rule

NASAA supports the Proposal's amendments to FINRA Rule 4512 (Customer Account Information) that would require FINRA members to use reasonable efforts to obtain the name and contact information of a trusted contact person for non-institutional accounts. Obtaining a trusted contact is a critical step in fighting financial exploitation, as a trusted contact designation allows firms to contact a third party in the unfortunate event the firm suspects financial exploitation or other serious concerns about a customer. As proposed, the rule would also alleviate the privacy concerns many have raised regarding third-party notification, because the trusted contact information is obtained with the customer's consent. Further, while some firms have reported that they already utilize trusted contacts, NASAA's preliminary analysis of its 2016 Coordinated Broker-Dealer Examination indicates that the practice is not yet widespread or effectively implemented.⁶ A FINRA rule requiring reasonable efforts to obtain trusted contact information will go a long way to increase the use of this important weapon in the fight against financial exploitation.

NASAA Supports FINRA's Removal of Immediate Family Member Notification

FINRA also has removed from the Proposal a requirement that an immediate family member of a customer receive notification of a delayed disbursement if no trusted contact was

⁴ NASAA's initial comments are available at <http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2011/07/Final-NASAA-Comment-to-FINRA-15-37.pdf>.

⁵ The Model Act limits a disbursement delay for a maximum duration of 25 days, unless extended by a court, whereas the Proposal contemplates that disbursement delays could be extended for more than 25 total days by a state regulator or a court.

⁶ See 2016 NASAA Coordinated Broker-Dealer Examination Preliminary Findings at 6-7, available at <http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2011/09/2016-BD-Coordinated-Exam-Preliminary-Findings.pdf>.

designated or available. NASAA supports the removal of this provision, as the issue of contacting an immediate family member implicates privacy concerns and may well serve to exacerbate the very problem it is meant to resolve. For instance, the rule would not have authorized a firm to contact a non-marital partner with whom an investor may share a home while allowing a firm to contact an estranged child. Additionally, elderly individuals often are reluctant to reach out to their adult children when it comes to financial issues for fear that their children will place them in a nursing home. While a challenge to balance, it is important that any approach to third-party notification recognizes the need for, and respects, the independence of investors particularly as they age. Removing the immediate family member notification requirement strikes an appropriate balance.

The Proposal Lacks Regulatory Reporting

While NASAA generally supports FINRA's proposal, particularly considering the increased urgency to address financial exploitation, NASAA notes that additional changes to certain aspects of the proposal are necessary. First, the proposal lacks any governmental reporting requirement—mandatory or otherwise. When talking about elder financial exploitation, we know that time is of the essence, either to prevent a detrimental transaction or other forms of elder abuse or self-neglect. The ability to have a regulator assess the situation and determine whether additional resources should be brought to bear is a key component of any approach intended to provide meaningful protection to vulnerable investors.

FINRA's proposal lacks any regulatory notification requirement, but when the concern for abuse rises to the level of delaying a disbursement: a regulator should be notified. Absent state laws that might otherwise mandate reporting, the Proposal empowers a firm to delay a disbursement in instances of suspected financial exploitation yet not report that very same suspicion to authorities for assistance or potentially further investigation. Accordingly, FINRA should amend the Proposal to require at a minimum that firms notify FINRA and the relevant state regulators when a firm decides to delay a disbursement, or even further that firms give regulatory notification upon a reasonable belief of financial exploitation regardless of a firm's decision to delay a disbursement—as required in the NASAA Model Act—to even better protect our most vulnerable investors.

Regulatory Approval Should be Required Prior to Extending a Disbursement Delay

The Proposal also should be amended to require regulatory approval prior to the extension of any disbursement delay beyond the initial 15 business days. As currently proposed, a FINRA member can delay a disbursement for five business weeks without any regulatory assessment of the facts and circumstances. A better approach is that taken in the Model Act, which requires regulatory authorization before a disbursement delay can be extended. Having an independent, regulatory review of the facts and circumstances that resulted in a disbursement delay better balances the competing concerns of allowing an investor access to his or her money and preventing potential exploitation.

Moreover, as proposed, FINRA's rule contemplates that a disbursement delay (either an initial delay or an extended delay) can be terminated at any time by a state regulator. However, without a requirement that state regulators receive notification of a disbursement delay, there is no realistic mechanism by which a regulator would learn of a disbursement delay, let alone be able to assess the facts and circumstances and direct a firm to process the disbursement. In the Proposal, FINRA reminds its members that they must comply with any state notification laws. While this reminder is encouraging, confusion could arise regarding a firm's obligations under the proposed FINRA rule and potentially more robust state laws. Therefore, to reduce this potential confusion and avoid potentially chilling firms from utilizing this important new tool, FINRA should require its members to notify the relevant state regulators—namely state securities regulators and state adult protective services agencies—when a disbursement is delayed.

FINRA Should Narrow its Definition of Specified Adult by Referring to State Law

Finally, while the NASAA Model Act and the Proposal each define eligible adult (Model Act) and specified adult (FINRA's Proposal) as individuals aged 65 or older, the Proposal also applies to those 18 years or older for whom a firm reasonably believes has an impairment, either physical or mental, that prevents the individual from protecting his or her own interests. The Model Act contains a slightly different definition when it comes to individuals 18 years or older ("non-seniors"). The Model Act applies to individuals that would be covered under the adopting state's adult protective services statutes.

NASAA continues to believe the Model Act's approach is more appropriate when it comes to non-seniors. As proposed, FINRA's rule provides its members too much discretion in determining whether an individual is impaired. FINRA points to the varying state laws as an impediment to referencing their requirements in the Proposal; however, in NASAA's view, referring to state law is the superior approach. State adult protective services statutes have a significant body of law and guidance regarding their applicability, making it easier for firms to determine whether certain individuals are covered. This guidance and law will help a firm determine whether an individual may be impaired. Further, under the rule as proposed, firms may be reluctant to apply the rule's disbursement delay provisions to non-seniors because firms will fear the risks associated with "mistakenly" identifying a non-senior customer as impaired. Referring to existing state laws on the subject could reduce this chilling effect given the already developed body of law surrounding these statutes' applicability.

NASAA supports FINRA's efforts to address senior financial exploitation and applauds the improvements FINRA has made to the Proposal since unveiled in 2015. NASAA welcomes the opportunity to continue to work with FINRA on this important regulatory initiative, but notes that certain changes to the Proposal are necessary to increase the Proposal's effectiveness and utility in protecting vulnerable investors.

Mr. Fields
November 28, 2016
Page 6 of 6

If you have any questions about these comments, please contact NASAA's General Counsel, A. Valerie Mirko, at [REDACTED] or [REDACTED], or Judith Shaw, Maine Securities Administrator and Chair of NASAA's Seniors Committee, at [REDACTED] or [REDACTED].

Sincerely,

A handwritten signature in cursive script that reads "Mike Rothman".

Mike Rothman
NASAA President
Minnesota Commissioner of Commerce