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New Rules Seek to Protect Seniors from Financial Exploitation

By: Brian P. Nally

Introduction

In recent years, there has been an increased focus on how the "aging population" will impact the financial services industry. The first wave of Baby Boomers began reaching the age of 65 in 2011, and the U.S. population continues to see a dramatic increase in the population aged 65 or older.[1]

As of 2010, there were 40.3 million people aged 65 or older and that number is expected to more than double to 83.7 million by 2050.[2] This growth is expected to be most dramatic in the short-term, with the sharpest increase occurring between 2010 and 2030.[3] With an aging population comes an increase in mental health concerns. Advancing age is the single-largest risk factor for dementia and Alzheimer's disease.[4] And because people aged 85 or older constitute the fastest-growing segment of the population, the pervasiveness of these cognitive impairments is expected to rise.[5] Other issues impacting mental health, such as depression, loss of vision, loss of hearing, loss of mobility, and disability, will also become more prevalent in the later years of life. This reality has led regulators, self-regulatory agencies, states and financial services companies to take action.

New FINRA Rules Attempt to Address Financial Exploitation

On Feb. 5, 2018, two new rules from the Financial Industry Regulatory Authority ("FINRA"), the self-regulatory body overseeing broker-dealers and their registered persons, became effective: FINRA Rule 2165 (Financial Exploitation of Specific Adults), and amendments to FINRA Rule 4512 (Customer Account Information). These rules were passed to address the "serious and growing problem" of financial exploitation of our aging population.[6] They also provide professionals in the securities industry with specific tools to more quickly and effectively address suspected financial exploitation of seniors.[7]

Under the new amendments to FINRA Rule 4512, broker-dealers are required to make reasonable efforts to obtain the name of and contact information for a "trusted contact person."[8] This applies upon account opening or when updating an existing account.[9] This requirement goes hand-in-hand with the rule's requirement that a member disclose in writing to the customer that it is authorized to contact the "trusted contact person" and disclose information about the customer's account to address suspected financial exploitation.[10] The

[1] U.S. Census Bureau, P23-212, 65+ in the United States: 2010, 1 (2014), https://wwcensus.gov/content/dam/Census/library/publications/2014/demo/p23-212.pdf.
[2] *Id.* at 5.
[3] *Id.*
[4] *Id.* at 40.
[5] *Id.*
[6] Financial Industry Regulatory Authority, Regulatory Notice 17-11, 1 (March 2017), http://www.finra.org/sites/default/files/Regulatory-Notice-17-11.pdf.
[7] *Id.*
[8] *Id.* at 2.
[9] *Id.*
[10] *Id.* at 2-3.

continued on page 21

"trusted contact person" is intended to be a person who can be relied upon to protect the customer's account. For example, the trusted contact person may be contacted if the registered representative for the account suspects the client is suffering from Alzheimer's disease, dementia, or other forms of diminished capacity, or if the customer is ill or simply unresponsive.[11] This is an important change to who a financial professional may contact or provide information about an account. Previously, financial professionals could not contact a non-accountholder to discuss information about an account under Regulation S-P, which generally prohibits financial institutions from providing customer information to third parties.

The amendments to FINRA Rule 4512 work hand-in-hand with the new FINRA Rule 2165. Under FINRA Rule 2165, a member is permitted to place a temporary hold on an account when the person reasonably believes that financial exploitation has occurred, is occurring, or has been attempted or will be attempted. While the action is not mandated, the rule provides a "safe harbor" if a member exercises discretion to place a hold on an account to investigate suspected financial exploitation. If a member places a temporary hold on an account, the firm must immediately initiate an internal review of the situation and provide written notice to the customer and trusted contact person that a hold has been placed on the account and the reason for it.[12] The original hold will expire within 15 business days, but can be extended once for 10 business days. At the end of this period, the member must reach a conclusion about whether the hold should be lifted or extended through some additional action (e.g., a court order).[13]

Rule 4512 applies to a person aged 65 or older or a person 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.[14] And the rule has been limited to "disbursements" only, not on any other transactions (e.g., a request to sell a stock).[15] In defining "financial exploitation," FINRA has been less clear. This phrase could include virtually any action that would lead to the wrongful or unauthorized taking of funds or securities from an account, even in situations where someone is acting pursuant to a power of attorney, guardianship or other authority. FINRA has also provided less-than-clear guidance on what constitutes a "reasonable belief" that financial exploitation is occurring, relying on a "facts and circumstances" approach without any set parameters.

The imprecise guidance provided by these FINRA rules will unquestionably lead to tremendous uncertainty. Financial professionals for elder clients – or younger clients with cognitive impairments – will now be placed in the precarious situation of assessing the mental health of their clients. Moreover, these rules suggest that financial professionals will now be expected to assess the validity or authenticity of legally binding documents, such as Powers of Attorney, to ensure the documents were not obtained through improper means, such as undue influence or deceit. And to make matters more challenging, the shift in our society's method of communicating – away from in-person meetings and toward telephone and other electronic forms of communication – will mean financial professionals will be forced to make these determinations with potentially limited client interaction and imperfect information.

[12] *Id.* at 4.
[13] *Id.* at 5.
[14] *Id.* at 3.
[15] *Id.* at 4.

There is no question that exploitation of our aging population is a sincere concern and something the financial services industry must take seriously. This is especially true with the growing sentiment that financial professionals should act in their client's best interest and because financial professionals often act as the last line of defense between the "exploiter" and a client's money. Although these new rules technically only apply in the FINRA context, all financial professionals should be on guard of potential financial exploitation of our aging population, and consider the following:

continued on page 22

1. **Know your client's family status.**
   As a client relationship develops, it is important to understand more than the basic information (e.g., single vs. married, the number of children, etc.). Understanding the dynamic between family members (e.g., a parent and child, brother and sister) and understand who is within your client's circle of trust.

2. **Know your client's preferences.**
   Understand patterns in your client's method of communication. Pay attention to whether your client generally prefers communication in-person, over the telephone, or through electronic communication and be receptive to any material change to this pattern. Also pay attention to any patterns in the timing of communication. Some clients may habitually communicate about their financial issue early in the day while others do so at night. A significant departure from these habits could be a red flag for potential exploitation.

3. **Understand life changes.**
   Understand if your client has lost a spouse, child, friend, caregiver, or someone close to them. These life changes could give rise to an opportunity for new and potentially exploitive relationships to develop.

4. **Understand changes in environment.**
   As client's increase in age, they may relocate to a retirement community, downsize to a home in a new community, or move into a nursing home or long-term care facility. New environments will expose clients to new and to potentially exploitive relationships.

Conclusion

The new FINRA rules demonstrate the increased focus on protecting against financial exploitation of seniors. A noble endeavor, for sure, but the practical impact on the financial services industry will be significant. The investment industry must continue to develop appropriate training and education for their representatives and increase awareness about how to best detect and prevent financial exploitation.

Brian Nally is a partner out of the Cleveland and Indianapolis offices of Reminger Co., L.P.A. He focuses his practice on securities litigation and arbitration, and has experience representing clients in state and federal court, as well as arbitration before the Financial Industry Regulatory Authority (FINRA) and American Arbitration Association (AAA). Brian also has experience representing clients in government regulatory investigations and enforcement actions brought by FINRA, the Securities and Exchange Commission, professional boards (e.g., the CFP Board), state-departments of securities, and state-departments of insurance. For three consecutive years (2014, 2015 and 2016), Brian has been recognized as a "Rising Star" by Ohio Super Lawyers Magazine, a recognition given to less than 2.5% of lawyers in Ohio.