April 5, 2016

Ms. Rhonda Reeves
Deputy Commissioner of Securities
Louisiana Office of Financial Institutions
Securities Division
8660 United Plaza Blvd., 2nd Floor
Baton Rouge, Louisiana 70809

RE: SB 338, the Louisiana Protection of Vulnerable Adults from Financial Exploitation Law

Dear Deputy Commissioner Reeves,

On behalf of the Securities Industry and Financial Markets Association (SIFMA),[1] I would like to provide you with comments based on our review of senior investor protection legislation that was recently introduced in the Louisiana Senate – SB 338, the Louisiana Protection of Vulnerable Adults from Financial Exploitation Law – in the hope that we can work together to design strong, operationally effective protections for Louisiana's seniors.

SIFMA represents the shared interests of hundreds of securities firms, banks and asset managers, many of whom have a presence in Louisiana. In fact, there are more than 18,000 individuals in Louisiana working in the securities industries, and more than 140,000 employed by entities falling within the broader category of finance and insurance. Notably, SIFMA has been a vocal advocate in the fight against senior financial exploitation for the past seven years, has formed a 147-member working group representing the interests of nearly 50 diverse member firms, and has worked with multiple states[2] to enact laws which create a voluntary reporting pathway for Broker-Dealers and permit them to place temporary holds on suspicious transactions and/or disbursements to allow time for the state to investigate (commonly referred to as "Report & Hold" laws). We have also recently submitted comments to both the North American Securities Administrators Association (NASAA) and the Financial Industry Regulatory Authority (FINRA) on their respective "Report & Hold" proposals, which seek similar goals but face certain operational challenges.

In addition to these efforts, SIFMA and its member firms have been instituting additional, robust and innovative actions under existing law to protect our senior and vulnerable clients from the threat of financial exploitation. Notably, our member firms have developed and implemented vigorous senior investor protection training programs, initiated the collection and use of "trusted contacts,"

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[1] SIFMA is the voice of the U.S. securities industry, representing the broker-dealers, banks and asset managers whose 889,000 employees provide access to the capital markets, raising over $2.4 trillion for businesses and municipalities in the U.S., serving retail clients with over $16 trillion in assets and managing more than $62 trillion in assets for individual and institutional clients including mutual funds and retirement plans. For more information, visit http://www.sifma.org.
[2] Washington State, Missouri, Delaware and Indiana.

and entered into voluntary arrangements with clients to provide firms additional authority in cases of suspected financial exploitation.

SIFMA is greatly heartened by your action to take steps to better protect vulnerable investors in Louisiana, and commend you for thoughtful changes to the NASAA Model, including embracing Louisiana's existing voluntary reporting framework, which is compatible with FINRA's "Report & Hold" proposal. However, we do have concerns with some of the specific mechanisms included in this bill. As such, we have provided a brief overview of our suggestions and concerns below, many of which have already been taken in account by states that have considered a proposal based off the NASAA model, and have attached copies of our Comment Letters to both NASAA and FINRA.

I. Remove Limits on the Discretion and Authority of the Louisiana Securities Commissioner:

- SIFMA firmly believes that it should be in the discretion of the Louisiana Securities Commissioner to be able to extend the hold and investigatory period for as long as the Commissioner determines is necessary to investigate particularly complex cases. The time periods set forth in Sec. 725.4 of SB 338 would place clear and unnecessary limits on the discretion and authority of the Louisiana Securities Commissioner. Specifically, Sec. 725.4(B)(2) would provide for an initial hold of 15 business days, which could be extended by an additional 10 business days by the Securities Commissioner or Adult Protective Services (APS). SIFMA urges you to consider adding language to this section that would allow those agencies to extend the hold for as long as they deem necessary. The addition of this language would provide the agencies with real authority to permanently stop specific cases of financial exploitation (currently, the only such recourse would be receipt of a court order). (For further discussion, please see: FINRA Letter, Sec. A(2)(ii); NASAA Letter, Sec. A(1).)

- Additionally, we respectfully request that you consider lengthening the aforementioned extension to 15 business days (as opposed to 10), in order to conform to the proposed national rule set forth in FINRA Regulatory Notice 15-37,[3] in addition to allowing that time period to be extended by order of the agencies or a court order. (For further discussion, please see: FINRA Letter, Sec. A(3)(i); NASAA Letter, Sec. A(2).)

II. Recognize the Important Role of the Securities Division and APS in Investigating Financial Exploitation:

- SIFMA recognizes the vital and important role of both the Securities Division and APS in investigating cases of suspected financial exploitation. These offices have additional resources, authority, and experience in the investigation of such matters and, in many situations, firms rely on the expertise of these offices to fully protect their senior clients.

[3] 15 business days, which can be extended by the firm for an additional 15 business days when warranted by the circumstances.

SIFMA strongly supports the Louisiana Securities Division's commitment to working with firms to protect senior investors, and believes it is important to codify this relationship, reference an investigation by the agencies in SB 338, and explicitly permit both agencies to inform Broker-Dealers and Investment Advisers of the status and results of an investigation initiated due to a report under the bill, in addition to any guidance the agencies may be able to provide. In fact, the closing of this "feedback loop" was highlighted as a "recommended practice" at a 2015 U.S. Senate Committee on Aging hearing discussing senior financial exploitation.[4] To this same end, SIFMA would also request that Sec. 725.6 (Records) of the proposal be amended to reflect two-way disclosures, ensuring that all shared information would be exempt from state public record laws. (For further discussion, see: NASAA Letter, Sec. A(1)(a).) Additionally, SIFMA believes that the unique, additional mandatory reporting requirement in Sec. 725.4(A)(2)(c), which would require financial institutions to report the findings of an investigation to the agencies after seven days, is both unnecessary and out of sync with the timeline contemplated by the SB 338.

III. Target Transactions to Provide Greater Protection to Senior Investors:

- In order to provide the greatest level of investor protection possible, SIFMA respectfully requests that these protections focus on "transactions," instead of simply "disbursements," in order to more completely address the range of exploitative actions regularly taken by bad actors. A focus on transactions is particularly important for firms to be able to prevent serious harmful consequences of an exploitative transaction that occur prior to a disbursement. Under the current language, if a client requests the liquidation of his assets in anticipation of a disbursement, the firm would still be under its current obligation to execute the sell order, which could have potentially disastrous effects on a client's retirement security. (For further discussion, see: NASAA Letter, Sec. A(4); FINRA Letter, Sec. A(4)(i).)

IV. Clarify Protections for Broker-Dealers and Investment Advisers:

- SIFMA maintains that it is critical that the focus of any senior investor protection framework be at the firm-level, and not the individual-level. While a qualified individual may be the one who has the reasonable belief of suspected financial exploitation, it is the firm that makes the report, places the hold and bears the burden of contacting any required parties, as well as the respective liability for such actions. Therefore, we respectfully request the removal of the "qualified individual" mechanism, placing the rights and responsibilities firmly at the firm-level.

- Moreover, the proposed definition of "qualified individual" is not reflective of the existing processes followed by firms in reporting cases of suspected financial

[4] U.S. Senate Committee on Aging, "Broken Trust: Combating Financial Exploitation of Vulnerable Seniors," February 4, 2015.

exploitation. Generally speaking, firms have designated individuals who regularly work with APS organizations, securities commissioners, and other parties to combat financial exploitation. Further, without a change to a firm-level focus, firms that have developed market-leading, centralized, multi-disciplinary teams to protect senior investors would be unable to utilize that expertise in the State of Louisiana, as team members are not always employed as either supervisors or legal or compliance personnel. To address this particular issue, in the alternative, we respectfully request that you consider using the following definition of "qualified individual":

> Any person either designated by a dealer or investment advisor or who serves in a supervisory, compliance or legal capacity for a dealer or investment adviser.

(For further discussion, see: NASAA Letter, Sec. A(3)(a); FINRA Letter, Sec. A(4)(ii).)

- With due regard for the above, perhaps the most immediate of SIFMA's concerns regarding the "qualified individual" structure is the lack of clarity in the protections provided to the qualified individual's employer. After a thorough read of the proposal, we believe that it intends to protect both the employee and employer when a qualified individual makes a disclosure in line with either Sec. 725.2 or 725.3 of the proposal. However, the corresponding immunity provisions in the same sections would not explicitly provide employer protections. Because the employee (the qualified individual) would be disclosing this information as part of his or her regular business duties, the employer (the Broker-Dealer or Investment Adviser) would be held equally liable for their employee's actions under the legal principle of respondeat superior. In order for this bill to function as proposed, Broker-Dealers and Investment Advisers must be added to Sec. 725.2(A)(2) and Sec. 725.3(C). To this same end, we would note the absence of any immunity provision for acting in accordance with Sec. 725.6 (Records) of the bill, and urge you to consider inserting language similar to Sec. 725.2(A)(2) (Governmental Disclosure Immunity), Sec. 725.3(C) (Third-Party Disclosure Immunity) and Sec. 725.4(D) (Disbursement Delay Immunity) within Sec. 725.6 or as Sec. 725.7.

- We are also concerned with the use of the language "exercising good faith and reasonable care" in Sec. 725.2, 725.3 and 725.4 of the legislation. This is an atypical standard in securities law and thus there is a lack of case law to guide the courts in the use of this standard. Instead, SIFMA suggests utilizing a well settled "good faith" standard. (For more information, please see NASAA Letter, Sec. B(1)(a).)

- Finally, SIFMA would like to point out two sections where SB 338 appears to intend to use conditional language, but the proposed text is confusing. We would like to highlight Sec. 725.2 and 725.3, which state that, "if a qualified individual reasonably believes that financial exploitation of an eligible adult may have occurred, may have been attempted, or **is being** attempted…" SIFMA strongly supports the use of conditional language

(may be occurring) as providing the strongest possible protections in Louisiana. (For further discussion, see: NASAA Letter, Sec. B(1)(b).)

V. Ensure Retention of Current Investor and Client Protections:

- In addition to the above, SIFMA believes that it is important that SB 338 in no way limits the existing rights of investors to enter into contracts for their own protection, or the ability of Broker-Dealers and Investment Advisers to combat financial exploitation under existing law. Currently, the proposal would provide immunity for firms who act within the four corners of the regulation, but does not address how it would treat firms who act in accordance with other current laws or in accordance with pre-existing customer agreements. As such, SIFMA respectfully requests the addition of a clause noting that this proposal would not limit activities otherwise permitted by state or federal laws, rules or regulations, through agreement with the client or their authorized representative, or in accordance with prior written client instructions or lawful orders.

VI. Simplify Notification Obligations:

- While SIFMA has a number of concerns related to the reporting and notification obligations throughout the bill (for a fuller understanding of our position, please see FINRA Letter, Sec. A(3)(ii)), there are two items that we would like to submit for your immediate consideration. First, SIFMA respectfully requests the reconsideration of requiring that the Broker-Dealer or Investment Adviser "provides written notification to all parties authorized to transact business on the account" when a hold is in place. Often, when a suspect transaction occurs, placing a hold and contacting the senior client to notify them of the suspicion will immediately resolve the issue. In those cases, it is unnecessarily burdensome and may cause unnecessary embarrassment to the senior client for the firm to then contact all other authorized parties (e.g., children are often authorized to transact limited business on a senior's account).

- Second, under the above language, the immunity provided for placing a hold in accordance with Sec. 725.4 of the bill would rest, in large part, on the ability to affirmatively make that notice. While our member firms do not have an issue notifying certain parties when a hold is placed, some individuals can be difficult to reach in such a short time frame: they may be on vacation, visiting family, away on business, or (sadly) incapacitated due to injury or in the hospital. As such, conditioning the receipt of protection on the actual notification of these individuals would be highly problematic, and SIFMA suggests requiring reasonable efforts to provide written notification to the account holder and the individual initiating the transaction within two business days.

VII. Clarify Third-Party Disclosures:

- SIFMA would also like to seek clarification regarding the "previously designated by the eligible adult" language in Sec. 725.3(A) of the proposal. Specifically, SIFMA believes it is important to clarify what would constitute "designated" in the context of the regulation. For instance, if SB 338 is referring solely to written notification, then the bill would not expand upon existing capabilities and could only serve to unintentionally limit the ability of financial institutions to make such disclosures. However, if the proposed language is intended to provide financial institutions with the important ability to reach out to individuals close to the client (as recognized in both the Indiana and Missouri laws and the FINRA proposal), SIFMA would seek further clarification of this language. Alternatively, one state has been exploring the use of permitting contact to a third party "reasonably associated with the account owner" when financial exploitation is suspected. This language is supported by SIFMA and we would urge your consideration of such a provision as well. SIFMA believes that this would clarify the current definition and provide firms with an important, effective tool in senior investor protection efforts that is already in place elsewhere. (For further discussion, please see: NASAA Letter, Sec. A(5); FINRA Letter, Sec. A(1)(ii).)

Thank you again for your efforts on behalf of Louisiana seniors, and we look forward to the opportunity to work with you to address these issues and better protect seniors investors in your state. If you have any questions or if there is any further information we can provide, please contact either me at 212-313-1233 or nlancia@sifma.org.

Sincerely,

Nancy Lancia
Managing Director
SIFMA State Government Affairs

Enclosed:
- SIFMA Comments to NASAA re: Proposed Model Act to Protect Vulnerable Adults from Financial Exploitation
- SIFMA Comments to FINRA re: Regulatory Notice 15-37

APPENDIX I:
SIFMA COMMENTS TO NASAA RE: PROPOSED MODEL ACT OT PROTECT VULNERABLE ADULTS FROM FINANCIAL EXPLOITATION

October 29, 2015

Lynne Egan (MT), Chair, Senior Issues/Diminished Capacity Committee (legan@mt.gov);
Patricia Struck (WI), Vice-chair, Senior Issues/Diminished Capacity Committee (patricia.struck@dfi.wisconsin.gov);
Christopher Staley, Counsel, NASAA (cs@nasaa.org).

Re: COMMENTS REGARDING NASAA'S PROPOSED MODEL LEGISLATION OR REGULATION TO PROTECT VULNERABLE ADULTS FROM FINANCIAL EXPLOITATION

Dear Ms. Egan, Ms. Struck and Mr. Staley:

Thank you for the opportunity to submit these comments regarding NASAA's proposed Model Legislation or Regulation to Protect Vulnerable Adults from Financial Exploitation ("the Model") on behalf of the Securities Industry and Financial Markets Association[5] (SIFMA). We join our member firms in appreciation of the important work state securities regulators do with our firms to help us protect our clients – especially our senior investors. We also share NASAA's view that more can be done to protect senior investors – particularly if state regulators and the securities industry work together toward that goal.

Senior financial exploitation is a problem that costs senior investors an estimated $2.9 billion annually[6] – funds that many were relying on to support them in retirement. Moreover, with 10,000 Americans turning 65 every day and an estimated 1 in 5 Americans aged 65 or older being victimized by financial fraud, this problem will continue to grow. Complicating these protection efforts is the fact that only an estimated 1 in 44 cases of financial elder abuse is reported and the fact that 55% of financial abuse in the United States is committed by family members, caregivers and friends.

Senior financial exploitation is a serious threat to every American, and with your 2008 release of the Model rule on Senior-Specific Certifications & Designations, last year's establishment of your Board-level Committee on Senior Issues & Diminished Capacity, and your work on this Model, it is clear that state securities regulators have made a commitment to bring their frontline investor protection expertise to bear on the unique challenges of senior investor protection.

[5]SIFMA is the voice of the U.S. securities industry, representing the broker-dealers, banks and asset managers whose 889,000 employees provide access to the capital markets, raising over $2.4 trillion for businesses and municipalities in the U.S., serving clients with over $16 trillion in assets and managing more than $62 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.
[6] "Broken Trust: Elders, Family, and Finances," MetLife, March 2009.

For our part, SIFMA and our member firms have also been actively working on senior investor protection issues. We have a Senior Issues committee made up of 32 distinct member firms, have worked with 3 states to enact state-specific senior investor protection laws, and have instituted an annual Senior Investors Forum bringing together scientific experts, regulators (state, federal and SRO) and the financial services industry to discuss policies, innovative practices, ongoing training, compliance, and stakeholder coordination, as well as the science and demographics of cognitive decline. We also are working to increase funding for the investigation of financial abuse and advocating for streamlining APS reporting.

As noted above, three states have enacted laws designed to provide securities firms with stronger tools to protect their senior clients: Washington State, Delaware and Missouri. As more states and securities regulators consider similar proposals in 2016, many will look to NASAA's Model for guidance. Moreover, FINRA released Regulatory Notice 15-37 this month (October 2015), which addresses many of the same issues as this Model from a nationwide perspective.

As state proposals are poised to multiply rapidly, and FINRA issues a rulemaking to address this issue, we have come to a particularly important juncture. Now more than ever, it is vital to ensure effective coordination between NASAA and FINRA, the industry's two frontline regulators. Ensuring coordination at both the state and national level is necessary to establish an efficient legal framework that will effectively protect senior and vulnerable investors from financial exploitation, and also provide compliance clarity for firms.

In this comment letter, SIFMA identifies several opportunities where the Model could promote consistency with the FINRA proposal and benefit all parties involved – particularly the senior and vulnerable investors we are all seeking to protect: (1) a focus on firm-level, instead of individual, reporting (§A(3)a); (2) the use of voluntary, instead of mandatory, reporting (§§A(3)b-c); (3) the use of universally appropriate delay-related time periods (§A(2)); (4) the use of a consistent "reasonableness" legal standard (§B(1)); and (5) clarification of the third party disclosure provisions in §5 of the Model to permit contact of third parties beyond those designated in writing, without requiring the collection and documentation of such information (§A(5)).

These are only a few examples of opportunities for coordination, and SIFMA urges NASAA and FINRA to meet and work closely together to strengthen the regulatory coordination between two of the leading regulatory entities in this space.

Moreover, there are a number of small changes (or clarifications) to the Model that, based on the experience of SIFMA and its member firms' efforts to protect its clients to date, will serve to magnify the effectiveness of any law enacting NASAA's Model, as well as a few technical adjustments to the language which will allow the mechanisms included in this Model to function more effectively.

A. Strengthening Senior and Vulnerable Investor Protections:

1. The Importance of Recognizing the Efforts of All Parties in Any Effective Senior Investor Protection Framework

One of our most foundational issues relates to the conduct of investigations detailed within the four corners of the Model. Specifically, the proposal directly references the need for firms to initiate an internal investigation of a suspect disbursement and provide the results of such investigation to the

agencies,[7] without recognizing the existence of a possible investigation by an agency, or the extension of any immunity provision[8] to a firm's final decision when a transaction is determined to be exploitative of an "eligible adult."[9] SIFMA believes that, due to the nature of all model proposals, this creates a need to develop provisions instructive to legislators using the Model to craft their own state-specific senior investor protection laws.

In each of the states where similar proposals were enacted into law (Washington State, Delaware[10] and Missouri), the senior investor protection initiative grew out of an organic partnership between regulators, industry members and APS organizations. Through these partnerships, the desire of the agencies to investigate reported instances of exploitation and provide (possibly informal) guidance to member firms was made abundantly clear, and – perhaps most importantly – understandings were formed about what would happen when one of the partners (the regulator, APS or the firm) found an instance of financial exploitation.

However, when individual state legislatures consider a model piece of legislation, those vital discussions may not occur until too late in the process. Further, given the weight of a model from NASAA and the high likelihood that a NASAA Model is enacted in a state without the extensive surrounding conversations, we believe it is imperative that these matters be clearly addressed within the four corners of any model.

This is particularly important because, without either: (1) receipt of guidance from the agencies directing a firm to place a 'full stop' on a transaction when the agencies determine it to be exploitative of an eligible adult; or (2) immunity from administrative or civil liability when a firm places a 'full stop' on a transaction a firm determines to be exploitative of an eligible adult as a result of its internal investigation, this Model may not change the existing legal landscape in any meaningful way, nor be able to effectively protect senior investors in the way we all intend.

a. The Importance of Recognizing the Agencies' Vital Role in Any Effective Senior Investor Protection Framework

As mentioned above, the current Model does not directly reference an investigation by either of the agencies, but directly addresses a firm's internal investigation in §7(1)(b)iii, inferring that the burden of the investigation is solely on the firm. Not only have state securities regulators traditionally served a robust, frontline role in protecting investors, they are highly effective at investigating securities fraud and exploitation and have expressed a clear desire to investigate reported cases of suspected exploitation. However, the current Model does not specifically recognize any investigatory role for these offices. State securities regulators have extensive experience in securities investigation, much greater authority and access to information than individual industry members and, in many cases, their offices are specifically designed to perform this type of investor protection. For these reasons, a parallel investigation by the agencies is vitally important in any investor protection effort and SIFMA believes that the existence of a possible agency investigation and the ability of the agencies to provide feedback to member firms need to be explicitly referenced in the Model.

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[7] §7(1)(b)iii of the Model.
[8] §§4, 6 and 8 of the Model.
[9] §2(3) of the Model.
[10] In fact, Delaware specifically references both an agency investigation and guidance to firms in §3910(c) of Title 31 of the Delaware Code.

Moreover, a direct reference to guidance from the agencies will likely serve to alleviate certain privacy concerns of APS organizations. In a large number of instances, securities firms have reported suspected financial abuse to APS organizations across the nation that have not been a part of the senior investor protection initiative development process, and are subsequently unable to receive feedback on an investigation (and many APS organizations refuse to acknowledge whether an investigation has been opened). In certain cases, without knowledge of the status or results of an APS investigation, firms are unnecessarily hindered in acting to protect an eligible adult's assets, and are required to execute orders to the detriment of a senior or vulnerable investor. Further, the closing of this "feedback loop" was highlighted as a "recommended practice" at a 2015 Senate Committee on Aging hearing discussing senior financial exploitation.[11] The inclusion of a provision permitting feedback should serve to alleviate that issue, and fundamentally improve the senior investor protection process. To this same end, SIFMA would request that §9 of the Model be amended to reflect two-way disclosures, ensuring that all shared information is exempt from state public record laws.

Additionally, the requirement for firms to "immediately [initiate] an internal review"[12] is unnecessarily duplicative. Once a possibly suspect transaction is identified, firms initiate an internal review to determine if the transaction is in fact suspicious and whether the facts surrounding the transaction rise to the level sufficient to support a report to the agencies. The Model already tacitly requires firms to initiate an internal review **prior** to the placement of any delay. By providing for disclosure of a suspect disbursement to either the government[13] or a third-party[14] when there is a "reasonable [belief of] financial exploitation of an eligible adult […],"[15] the Model already requires an internal review to exist to determine whether the facts and circumstances constitute a "reasonable belief." By explicitly requiring an investigation in §7(1)(b)iii, the Model creates unnecessary duplication and confusion. For example, would 7(1)(b)iii require an additional investigation for the sole purpose of §7 reporting? What happens in clear situations of financial exploitation where a firm provides a full initial report containing the results of an investigation along with its initial notice to the agencies of a delay required by §7(1)(b)ii?

b. The Importance of Ensuring Investors Are Fully Protected When Financial Exploitation of an Eligible Adult is Found, Even When the Agencies Do Not Act

Perhaps the most important understanding that has evolved out of the regulator-APS-industry partnerships in Washington State, Delaware and Missouri, is the understanding of what will happen when a firm finds financial exploitation. Unfortunately, the only remedy (beyond the delay and reporting provisions) currently provided in the Model for situations where financial exploitation of an eligible adult is discovered is the receipt of a court order.[16] This means that, under the Model, firms would be required to seek a court order every time financial exploitation is discovered and persists after the time limits provided for in the Model. As noted above, senior financial exploitation is a nearly $3 billion industry and this mechanism would likely add tens of thousands of cases to already overburdened civil courts nationwide. Moreover, the Model would require the

[11] U.S. Senate Committee on Aging, "Broken Trust: Combating Financial Exploitation of Vulnerable Seniors," February 4, 2015.
[12] §7(1)(b)iii of the Model.
[13] §3 of the Model.
[14] §5 of the Model.
[15] §§3 and 5 of the Model.
[16] §7(3) of the Model.

receipt of such an order within 10 days (20 days with an agency extension) – an unworkable time frame in almost all state courts (discussed further in §A(2)c below).

SIFMA's member firms routinely identify, investigate and report cases of suspected financial exploitation to the government. However, should the agencies be unable to investigate or provide guidance to the firm (for whatever reason), the next steps (whatever those may be) must be taken by the firm. While some firms may provide for this situation in their individual account agreements, it is important that no firm should feel obligated to execute an exploitative transaction.

Currently, should neither of the agencies provide guidance to firms within the stated time period which allows them to refuse an exploitative transaction, a firm is vulnerable to liability for refusing the exploitative transaction. As written, firms "shall be immune from administrative or civil liability that might otherwise arise […]" for: (1) reporting to the agencies;[17] (2) reporting to a third party;[18] or (3) delaying a disbursement,[19] but firms remain vulnerable to such liability if they choose to continue to refuse an exploitative disbursement absent direction from a governmental authority.

If this Model is to have a meaningful effect in protecting senior investors beyond the existing law, and ensuring that those investors are sufficiently protected regardless of agency action, the immunity provisions[20] should be extended to cover the final decision of a firm when financial exploitation of an eligible adult is found. It is important to note that any concerns related to providing firms with this authority are already addressed in the Model by §7(2)(b), which allows the agencies to issue an order terminating a delay at any time.

Further, SIFMA urges NASAA to include language that ensures that any law enacted in conformity with this Model does not limit a firm's rights under existing law, or by agreement with its customers (e.g. through account agreements) to refuse to execute exploitative transactions.

2. The Importance of Timeframes that are Workable in All 50 States

Currently, the Model limits the time period of a delay to 10 business days, or 20 business days by request of one of the agencies. These time constraints are widely considered unworkable at a national level for multiple reasons: (1) the time period is insufficient to allow for a sufficient investigation in cases of complex fraud; (2) the 10 business day extension unnecessarily limits the authority and discretion of the state securities regulator; and (3) the 20 business day total limit is – by definition – too short of a time frame to secure a court order in many jurisdictions.

a. The Time Period is Insufficient for Complex Exploitation Cases

While many cases of financial exploitation can be investigated and a final determination can be made within the 20 day time period (such as exploitation from known scams), more than half of all financial exploitation is perpetrated by friends, family members or caregivers[21] and these cases often result in incredibly complex situations that routinely require more than 20 business days to

[17] §4 of the Model.
[18] §6 of the Model.
[19] §8 of the Model.
[20] §§4, 6 and 8 of the Model.
[21] "Broken Trust: Elders, Family, and Finances," MetLife, March 2009.

investigate. Moreover, APS organizations and securities regulators across the country have a tend to face resource challenges which limit their ability to investigate reported cases of suspected financial exploitation and provide guidance to firms[22] within such a tight and limited time frame.

We recognize that a 10 business day time period, without the possibility of a non-judicial extension, is present in the Missouri law, though this is a result of unique structures and capacities in place in Missouri that are non-existent or non-applicable in the majority of states.[23] Across the nation, many agencies do not have the same robust capability or judicial procedures (discussed further in §A(2)c below), and other jurisdictions have opted for longer time frames.

For example, the recent FINRA proposal[24]on senior investors provides for a 30 business day delay (an initial delay of 15 business days, renewable for another 15 business days at the <u>firm's</u> discretion if the facts warrant an extension). Additionally, the Delaware law[25] provides for an initial delay of 10 business days, which is automatically renewable for up to 30 business days if the firm did not receive guidance within that time frame.

b. The 10 Business Day Extension Unnecessarily Limits the Authority of State Securities Regulators

As the frontline investigators of state securities matters, many state securities regulators are granted broad discretion in the performance of their duties. Under §7(2)(b) of the Model, a state securities regulator's discretion would be curtailed, and the regulator would be limited – by law – to providing a single, 10 business day exemption.

As many regulators know all too well, there is no "one size fits all" solution to investigating fraud and financial exploitation – especially in the complex situations that tend to arise in the financial exploitation of a close relative. Each of these cases is unique and all of them must be approached on a case-by-case basis. While some cases may only require a 2 or 3 day extension, other particularly complex cases may require extensions beyond the stated timeframe provided in the Model (regardless of the final timeframes NASAA chooses). For this reason, the regulator should be able to determine the specific length of any extension beyond the specific time limits set forth in the Model, based on the immediate facts of the particular situation. Such a process is likely to result in a far more fair and equitable outcome than the application of a flat 10 business day legal mandate.

c. The Time Frame is Too Short to Secure a Court Order in Many Jurisdictions

As discussed in Sections A(1)b and A(2)a above, the maximum time limit of 20 business days is too short to secure a court order[26] in many jurisdictions. While some states, like Missouri, are able to provide a court order under emergency provisions on a short turn around, that is not the case in many states. For example, when this issue came up in Florida, a member of the Florida bar noted

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[22] The importance of which is discussed in §A(1)a of this letter.

[23] For example, during negotiations in Missouri, the state's agencies made assurances that they had the capacity and capability to investigate and return guidance on most every case within 10 business days, and for those where the 10 business day time period was insufficient, the agencies stated they would be able to seek an emergency court order to extend the time period – a court order that could be secured on short notice in that particular jurisdiction.

[24] FINRA Regulatory Notice 15-37.

[25] §3910(c) of Title 31 of the Delaware Code.

[26] Currently the only avenue of permanent relief available under this Model.

that senior financial exploitation orders fall under the non-emergency docket, where it takes a minimum of 21 business days to receive a hearing date. As a Model, this proposal must account for variations in judicial procedures across the 50 states, and therefore SIFMA respectfully requests a longer time frame that would be effective across those different jurisdictions.

d. Proposed Solutions

As discussed in §A(2)b above, there is no "one size fits all" solution to investigating fraud and financial exploitation. The specific facts and situations can vary greatly from one case to the next, and even two similar cases that seem simple on the surface can have substantially different levels of investigatory complications. For example, a situation where a senior client has never traveled outside of the country but wishes to liquidate his or her retirement account to remit advance-taxes due on foreign lottery winnings is a relatively straight-forward case of exploitation. However, if that same senior client has traveled to that foreign country repeatedly, is engaged to a national of that foreign country, and has family members who are asserting kidnapping claims, the result is a much more complicated investigation that requires coordination with the FBI, the U.S. State Dept., and foreign law enforcement. Such a case can take many weeks – or even several months – to investigate.

For the reasons above, and in the interest of regulatory coordination, SIFMA urges NASAA to consider utilizing the time frames for delay found in FINRA Regulatory Notice 15-37.[27] This would allow firms to place an initial 15 business day hold, which a firm could extend for an additional 15 business days if warranted by the facts. SIFMA believes that this time period, coupled with the agencies' ability to provide further extensions when warranted by the facts and circumstances, would provide firms with a reasonable time period in which to investigate possible cases of financial exploitation and seek a non-emergency court order when appropriate, while not limiting the existing authority of state securities regulators. Additionally, achieving uniformity between state laws and the rules of the industry's Self-Regulatory Organization (SRO) would increase the ability for the state regulators and FINRA to coordinate investor protection actions and result in a system that is more efficient for both the state and industry members.

Alternatively, should NASAA prefer to use a Model time limit based on an existing state law, SIFMA notes the well-crafted schedule in place in the Delaware law, which should provide for sufficient time to secure a non-emergency court order in the majority of jurisdictions:[28] an initial 10 business day delay, which can extend for an additional 30 business days if the firm receives no guidance from the agencies during that time.

Regardless of the specific time frame NASAA chooses to utilize, SIFMA respectfully requests that individual state securities regulators be permitted to use the full authority of their office and set the length of any extensions beyond the Model-designated timeframes at their discretion.

3. The Reporting Requirements Should Reflect the Realities on the Ground Across All Jurisdictions

§3 of the Model states that, "[if] a qualified employee reasonably believes that financial exploitation of an eligible adult may have occurred, may have been attempted, or is being attempted, the qualified

[27] FINRA Reg Notice 15-37, §2165(b)(2)-(3).
[28] §3910(c) of Title 31 of the Delaware Code.

employee shall promptly notify [the agencies]." However, SIFMA believes that a few changes to this language will create significantly more effective laws: (1) the language should require reporting at the firm level, not the individual level; (2) requiring mandatory reporting to the agencies is incompatible with the existing structures in many jurisdictions; and (3) mandatory reporting creates unnecessary burdens for the agencies, as well as the firms.

a. Reporting at the Individual Level is Unnecessary and Incompatible with Current Procedures

The Model defines a "Qualified Employee" as, "any agent, investment adviser representative or person who serves in a supervisory, compliance, or legal capacity for a broker-dealer or investment adviser."[29] By including both agents and investment adviser representative (individuals), as well as supervisory, compliance or legal staff (firm-level operators) in the definition of "Qualified Employee," the Model requires reporting from both individual and firm-level sources.

Most firms have a pre-determined escalation process for cases of suspected financial exploitation, which involves broker-dealer agents and investment adviser representatives escalating suspicious transactions to supervisory, compliance or legal staff. In mandating reporting by agents and investment adviser representatives, the Model would compel these individuals to either circumvent established reporting procedures put in place to properly vet suspicious transactions and avoid unnecessarily delaying legitimate transactions, or would require two reports to be made for the same incident (one at the individual level and one at the firm level). Therefore, SIFMA respectfully requests that §3 of the Model only apply to broker-dealers and investment advisers, consistent with the provisions in §7(1) of the Model.

b. Mandatory Reporting to the Agencies is Incompatible with Existing Structures in Many Jurisdictions

As previously discussed, it is important for a NASAA Model to account for the variations among the 50 states. In this case, there are a number of APS organizations which either do not have jurisdiction over financial exploitation cases, or cannot address financial exploitation cases due to a lack of funding.[30] In these cases, mandating possibly tens of thousands of reports to be made to organizations that do not have the jurisdiction, capacity, or capability to intake and process the reports is unnecessarily burdensome on the already over-burdened agencies, as well as the firms.

c. Mandatory Reporting Creates Costly, Unnecessary Burdens for the Agencies and Firms

It is a nearly universal practice for securities firms to report cases of suspected financial abuse in all jurisdictions. However, specific reporting practices tend to vary greatly between voluntary and mandatory reporting jurisdictions. In mandatory reporting jurisdictions, firms generally report cases of suspected financial exploitation as soon as facts support a "reasonable belief" that exploitation "may" occur. In many cases, this is as soon as a 'red flag' appears.

Alternatively, in voluntary reporting jurisdictions, firms will perform a more thorough investigation and will only report cases when there is a certain degree of confidence that exploitation is likely to occur. It is estimated that roughly 40 – 50% of all 'red flags' are false positives, and by culling these false positives before reporting to the appropriate agencies, it significantly reduces an unnecessary

[29] §2(7) of the Model.
[30] These jurisdictions include Kentucky, Tennessee and Iowa (which has jurisdiction over financial exploitation, but only applies to 'dependents'). *See* Ky. Rev. Stat. Ann. §209.020; T.C.A. §71-6-102; Iowa Code §§235B.1 et seq.

burden placed on the already strained agencies. Moreover, the reports sent to the agencies in voluntary reporting jurisdictions tend to have far more content, with a lot of the investigatory 'leg work' already being completed by the securities firm, thus further reducing the burden placed on the agencies and increasing the amount of resources they are able to dedicate to cases involving actual financial exploitation. Therefore, SIFMA respectfully requests that NASAA utilize a voluntary reporting standard in §3 of the Model.

Notably, voluntary reporting is supported by the National Adult Protective Services Association (NAPSA), and is the reporting structure that would be used under FINRA Reg. Notice 15-37.[31]

4. A Focus on Transactions Would Provide Significantly Greater Investor Protections

SIFMA believes that focusing on "disbursements" unnecessarily limits the protections provided by this Model; instead, SIFMA encourages NASAA to consider addressing "transactions," (as in the Delaware law) which would provide significantly more robust protections for senior investors and vulnerable adults. For example, under the current language in the Model, should an exploitative liquidation of investments occur, the firm would only be protected by the Model when they refuse to disburse the fruits of the exploitative sale, but would receive no protections for refusing the initial sale of the investment – an action that can be almost as damaging to an investor as the disbursement, and can trigger significant tax consequences, fees or other negative financial implications for the senior or vulnerable investor because the transaction may not be suitable or may be inconsistent with a client's risk tolerance, exposing the senior or vulnerable investor to financial losses.

Other examples of exploitative, non-disbursement transactions include: the buying of an investment product for the benefit of the wrong-doer, a change in ownership of an account, a change in the beneficiary of an account, or the incursion of penalties due to another change in the account (such as annuity-related surrender charges).

5. Clarification is Needed Regarding the Notification of Third Parties

According to the National Council on Aging, social isolation is one of the leading factors in the abuse of vulnerable adults.[32] It is important to note that, generally, social isolation does not mean a complete lack of social relationships, but merely the existence of minimal social contacts which shields perpetrators from scrutiny.[33] In the case of senior and vulnerable investors, this isolation can often translate into an unwillingness or inability to secure a power of attorney or provide an emergency contact. However, due to the long-lasting relationships Financial Advisors often form with their clients (including some multi-generational relationships), advisors can be aware of an individual that is trusted by their vulnerable client, but not placed on any official documentation with the Firm (such as a neighbor with a healthcare proxy or a family member whose relationship with the client is complicated by long distances).

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[31] FINRA Reg Notice 15-37.

[32] "Elder Abuse Facts," National Council on Aging, available at: https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/

[33] *See* "Social isolation in older adults: an evolutionary concept analysis," Nicholson NR, Jr, available at: http://www.ncbi.nlm.nih.gov/pubmed/19291185/; *See Also* "Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America," Hafemeister, Thomas L., available at: http://www.ncbi.nlm.nih.gov/books/NBK98784/

Often times, the exploitation of seniors and vulnerable investors can be directly prevented by reaching out to one of these trusted individuals in a timely fashion, regardless of the individual's status on the account in question. Moreover, this capability magnifies in importance when an individual's identified emergency contact is the individual suspected of abuse. In these cases, being able to reach out to a separate individual in a timely fashion can bring about the best resolution for the adult being exploited. This is a consideration that is recognized by both FINRA[34] and Missouri[35] in their respective senior investor protection initiatives.

As such, SIFMA respectfully requests that NASAA clarify §5 of the Model to expressly permit a qualified employee to contact, on a voluntary basis, a known, trusted individual or immediate family member that may have been identified by the client, even if the contact was not officially designated in a form attached to the account.

Alternatively, if the intent of the Model is to only permit the contact of third parties authorized in writing, SIFMA would suggest consideration of the removal of Sections 5 and 6 from the Model in their entirety. If that is the case, §5 would be duplicative of existing law, providing no additional benefits while risking unintended consequences that may in fact limit a firm's existing capabilities.

B. Necessary Legal Adjustment to Ensure Effective Implementation of the Senior and Vulnerable Investor Protections:

In addition to the substantive suggestions discussed above, SIFMA has identified two areas where we believe technical adjustments to the language will ensure the efficient and effective implementation of the senior and vulnerable investor protections.

1. The Model Utilizes Legal Standards that are Inconsistent and Atypical for Securities Regulation

There are two distinct legal standards utilized in this Model that are either internally inconsistent or overly restrictive: (1) the "good faith and exercising reasonable care" standard, as used in Sections 4, 6 and 8 of this Model for immunity for a covered action; and (2) the "reasonably believes […] will […]" standard, as used in §7(1)(a) of the Model as the standard for initiating a delay. In addition to these standards, SIFMA would seek consistent liability protections between the Model and the majority of the existing state laws.

a. "Good faith and reasonable care" is Internally Inconsistent and Insufficiently Settled and Defined in Securities Law

The "good faith and reasonable care" standard used in Sections 4, 6 and 8 of this Model is not a generally settled standard, nor is it regularly used in securities law. Because this standard is atypical in securities law, there is a dearth of case law to guide courts in the use of this standard. As such, the use of this standard will create uncertainty and confusion surrounding industry reliance on any law enacted under this Model – a result that is contrary to the intent of this Model.

[34] FINRA Regulatory 15-37, §2165(b)(1)(B)(ii).
[35] §409.610 of Missouri SSB 244 (2015).

Moreover, the standard is internally inconsistent with the other standards used in Sections 3, 5 and 7. For example, §3 requires any qualified employee that "reasonably believes" that financial exploitation may occur to report such belief, but only provides the qualified employee with immunity from civil and administrative liability if the qualified employee makes that report "in good faith and exercising reasonable care." These are clearly two separate standards that govern the same action.[36]

If the Model is enacted, this will lead to one of two likely results: either the courts will simply apply the standard that is considered stricter (which may vary from jurisdiction to jurisdiction because neither standard is sufficiently defined in case law, causing significant inconsistency problems for firms operating in multiple states); or the courts will combine the standards to create a new, stricter standard that is beyond the intent of the drafters and unique within securities regulation.

As such, SIFMA suggests the use of a consistent "reasonableness" standard throughout the Model.[37]

Also in the interest of internal consistency, SIFMA brings your attention to the structure in Sections 3 – 9 of the Model. In Sections 3 – 8, the sections alternate between governing an action and a complementary section providing protections for taking the governed action; however, §9 has no such subsequent section providing a related protection. This leaves the status of an action under §9 (Records) of this Model uncertain. If firms were able to provide these records under existing law, there would be no need for this section to be present, and without a '§10' providing coverage for firms which act in accordance with §9, the legal status of the action is unclear given structure of previous sections. As such, in the interest of internal consistency and certainty, SIFMA would ask for the inclusion of a §10 providing immunity for actions taken in accordance with §9 of the Model.

b. The "reasonably believes […] will […]" Standard is too High, Will Likely Result in an Unintended Chilling Effect, and is Internally Inconsistent

Under the Model, in order for a broker-dealer or investment adviser to delay a disbursement, there must be a "reasonable [belief]" that the disbursement "will" result in financial exploitation of an eligible adult.[38] However, SIFMA believes that this standard (also atypical in securities law) requires too high of a certainty that the exploitation "will" occur without the delay, which may cause a chilling effect in the use of any law enacted according to this Model. Moreover, the "will" standard is inconsistent with the "may" standard related to "Governmental Disclosures."[39]

As such, the Model would likely create an environment where large numbers of suspected financial exploitation situations are reported to the agencies, but no delay is implemented, which would only allow for an investigation to occur after the exploitation – the very issue this Model is looking to address. As such, SIFMA respectfully requests that the "will" standard used in §7(1)(a) is synchronized with the §3 "may" standard.

[36] Which, in this instance, is a mandatory action.
[37] While the Missouri law has an inconsistency similar to the proposed Model, FINRA Regulatory Notice 15-37 uses a "reasonableness" standard throughout, and the Washington State and Delaware laws use "reasonableness" to govern specific actions while utilizing a lower, "good faith" standard for the provisions providing immunity.
[38] §7(1)(a) of the Model.
[39] §3 of the Model.

c. To Remain Consistent with the Protections in the Majority of State Laws, the Model's Immunity Provisions Should Include Criminal Liability

In order to remain consistent with the protections afforded the majority of state laws (Washington State and Delaware), SIFMA suggests NASAA incorporate criminal liability in §§4, 6 and 8 of the Model.

2. The Term "Investment Adviser" Should be Sure to Include "Federally Covered Advisers"

The Model defines "investment adviser" by reference to state statute.[40] However, the definition of "investment adviser" in certain state statutes does not include "federally covered advisers," particularly in states which have implemented the Uniform Securities Act of 2002, which defines these two entities separately.[41] SIFMA believes the Model should emphasize the need for the definition to include federally covered advisers.

C. Single Access Portal for APS Reporting

Ensuring appropriate reporting of suspected financial exploitation is clearly a NASAA priority for senior investor protection efforts. To this end, SIFMA strongly supports APS proposals to create a single access portal for reporting incidents to APS organizations throughout the country. The design and organization of APS organizations varies greatly among the states: some agencies are within a state's 'Unit on Aging,' while others are independent state agencies, independent entities within another state agency, or one program in a larger state agencies.[42] Moreover, many APS agencies have jurisdiction over a specific county, city or other smaller jurisdiction – in California, each county has its own APS agency.[43]

Many times, finding the right agency to report to in a specific instance can be difficult and time consuming, and the dangers of reporting to an incorrect agency without the authority to investigate can cause delays with very real consequences for vulnerable adults.

In addition to streamlining the reporting process, a single reporting portal could also serve to streamline the feedback process and help securities regulators and APS organizations track reports nationwide, providing useful data for future investor protection efforts.

For these reasons, SIFMA is asking NASAA to lend its support to the development of a single-access reporting portal.

Thank you again for the opportunity to comment on the Model, which is a testament to the steadfast commitment of state securities regulators to protecting senior and vulnerable

[40] §2(5) of the Model.
[41] §102 of the Uniform Securities Act of 2002, as amended.
[42] "Adult Protective Services in 2012: Increasingly Vulnerable," National Association of States United for Aging and Disabilities, available at: http://www.nasuad.org/sites/nasuad/files/hcbs/files/218/10851/NASUAD_APS_Report.pdf
[43] "Adult Protective Services," California Department of Social Services, available at: http://www.cdss.ca.gov/agedblinddisabled/PG1298.htm

investors. SIFMA looks forward to working together to support additional states joining Washington State, Delaware and Missouri in implementing senior investor protections such as those outlined above. We would be happy to answer any questions, provide any additional information you seek or otherwise discuss our comments with you; please do not hesitate to contact either Marin Gibson (mgibson@sifma.org) at 212-313-1317 or Kyle Innes (kinnes@sifma.org) at 212-313-1211.

Sincerely,

/s/
Marin E. Gibson
Managing Director and Associate General Counsel
State Government Affairs

APPENDIX II:
SIFMA COMMENTS TO FINRA RE: REGULATORY NOTICE 15-37

December 1, 2015

To: Marcia E. Asquith
Office of the Corporate Secretary
Financial Industry Regulatory Authority
1735 K Street NW
Washington, DC 20006

RE: FINRA Regulatory Notice 15-37, Financial Exploitation of Seniors and Other Vulnerable Adults

Dear Ms. Asquith,

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")[44] on behalf of the Securities Industry and Financial Markets Association[45] ("SIFMA"). SIFMA joins our member firms in appreciation of the important work FINRA is doing to help the securities industry protect its clients – especially senior and vulnerable investors.

Senior financial exploitation is a problem that costs senior investors an estimated $2.9 billion annually[46] – funds that many were relying on to support them in retirement. Moreover, with 10,000 Americans turning 65 every day and an estimated 1 in 5 Americans aged 65 or older being victimized by financial fraud, this problem will continue to grow. Complicating these protection efforts is the fact that only an estimated 1 in 44 cases of financial elder abuse is reported and the fact that 55% of financial abuse in the United States is committed by family members, caregivers and friends.

Through FINRA's launch of its toll-free securities helpline for seniors and the release of Regulatory Notice 15-37, FINRA has made clear its commitment to bringing its frontline investor protection expertise to bear on the unique challenges facing aging and vulnerable investors. SIFMA is delighted to be able to work with FINRA on this initiative and looks forward to the final implementation of an effective and efficient senior investor protection framework.

For our part, SIFMA and our member firms have also been actively working on senior investor protection issues. We have a Senior Issues committee made up of 32 distinct member firms, have worked with 3 states to enact state-specific senior investor protection laws, and have instituted an annual Senior Investors Forum bringing together scientific experts, regulators (state, federal and self-regulatory organization) and the financial services industry to discuss policies, innovative practices,

[44] FINRA Regulatory Notice 15-37.
[45] SIFMA is the voice of the U.S. securities industry, representing the broker-dealers, banks and asset managers whose 889,000 employees provide access to the capital markets, raising over $2.4 trillion for businesses and municipalities in the U.S., serving clients with over $16 trillion in assets and managing more than $62 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.
[46] "Broken Trust: Elders, Family, and Finances," MetLife, March 2009.

ongoing training, compliance, and stakeholder coordination, as well as the science and demographics of cognitive decline. We are also working to increase funding for the investigation of financial abuse and advocating for more efficient and effective Adult Protective Services ("APS") reporting.

Additionally, many of our member firms have been establishing proven track records as innovators in the senior investor protection space by developing alternative methods to prevent financial exploitation and protect their customers under existing law. For instance, it was SIFMA member firms that first began collecting 'trusted contact' information from clients and securing advanced-permission to reach out to and enlist the support of these individuals in order to address concerns that the firm may have regarding their client. The use of trusted contact forms continues to grow as more firms whose business model allow for meaningful use of such information adopt a trusted contact policy.

Other firms have integrated robust senior investor protection arrangements into client agreements, in which the client provides the firm with permission to execute a variety of specified actions (including refusing to process a transaction) when the firm believes there is a risk of fraud or exploitation. Such initiatives (and others) have already been proven to help protect the assets of a large number of senior investors. In fact, the collection of trusted contact information has been so successful that FINRA has chosen to address that very initiative in its proposed rules.[47]

As noted above, three states have enacted laws designed to provide securities firms with stronger tools to protect their senior clients: Washington State, Delaware and Missouri. Moreover, the North American Securities Administrators Association ("NASAA") released for comment Model legislation/regulation to provide states with a template and encourage the development of senior investor protection laws in more states. Now, with the release of FINRA Regulatory Notice 15-37 – which addresses many of the same issues as these state laws from a nationwide perspective – we have reached an important juncture in the protection of senior and vulnerable investors throughout the United States. For this reason, SIFMA urges FINRA to strengthen its collaborative efforts with organizations interested in promulgating senior investor protection laws, particularly NASAA.

As NASAA reviews the comments to its Model proposal, FINRA has an important opportunity to collaborate with state regulators to promote an integrated, nationwide senior investor protection framework. For example, in its comment letter to NASAA, SIFMA advocated for NASAA to change its base hold period to conform to the potential 30 business day hold present in FINRA's proposed rules. Integrated and consistent laws at the state and national level can only serve to strengthen senior investor protection efforts and provide the most efficient and effective support possible to the securities industry's most vulnerable clients.

With that in mind, SIFMA respectfully submits our comments on the proposed rules below – comments which we believe will serve to strengthen the senior investor protection framework proposed in Regulatory Notice 15-37. For ease of reading, we have divided our comments into two sections: (1) comments on Proposed Rule 2165; and (2) comments on the proposed amendments to Rule 4512.

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[47] The flexible collection of 'trusted contact' information based upon each FINRA member firm's business model has been particularly successful.

A. Proposed Rule 2165 (Financial Exploitation of Specified Adults)

1. The Reporting Process

i. It is Important to Include Government Agencies and other Financial Institutions as Part of the Permissible Reporting Structure to Ensure the Highest Possible Level of Investor Protections

In each of the states where similar proposals were enacted into law (Washington State, Delaware and Missouri), the senior investor protection initiative grew out of an organic partnership between regulators, industry members and APS organizations, and a common goal to better protect the industry's senior and vulnerable clients. Through these partnerships, the desire of both state securities regulators and APS organizations to investigate reported instances of exploitation and provide (possibly informal) guidance to member firms was made abundantly clear.

APS organizations and state securities regulators, as well as traditional law enforcement agencies, have served an important and robust role in protecting seniors from exploitation, have greater tools to investigate instances of exploitation (state securities regulators are particularly effective at investigating securities fraud and financial exploitation), and have often expressed a clear desire to investigate reported cases of suspected exploitation.

However, in order for the agencies to investigate suspected financial exploitation, they must first be aware of the suspected financial exploitation. Across the United States, FINRA member firms regularly reach out to both state securities regulators and APS organizations to provide them with as much information as they are legally able to further investigations into cases of suspected financial exploitation. SIFMA believes that it is important for Proposed Rule 2165 to reflect these efforts in order to ensure the highest possible level of investor protections; therefore, SIFMA urges FINRA to include language in the proposed rules explicitly recognizing these situations by expressly allowing FINRA member firms to voluntarily report suspected cases of financial exploitation to state securities regulators, APS organizations, or other law enforcement officers in cases of suspected financial exploitation.

Further, to ensure that Proposed Rule 2165 provides for the most effective protections possible, it should clearly allow member firms to provide the agencies with all information, documentation, and account histories necessary to promote a full, robust investigation. This is a permission that is expressly included in every state senior investor protection law to date,[48] as well as NASAA's proposed Model. It is also important to ensure that the provision of these records falls within Proposed Rule 2165.01's safe harbor.

SIFMA respectfully requests that FINRA also consider recognizing a FINRA member firm's ability to contact other financial institutions which are receiving counter-parties of an account transfer when fraud or exploitation is suspected. Generally, FINRA member firms currently make such disclosures under anti-money laundering laws, but recognizing this authority within Proposed Rule 2165 or in the proposed amendments to Rule 4512 would streamline and significantly promote outreach to Automated Customer Account Transfer Service ("ACATS") counter-parties.

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[48] Washington State, Delaware and Missouri.

As discussed above, senior financial exploitation costs senior investors nearly $3 billion per year, and many of the individuals seeking to exploit senior and vulnerable investors are quite savvy. Moreover, as an estimated 55% of financial abuse in the United States is committed by family members, caregivers and friends, many of these bad actors have intimate knowledge of an investor's dealings and relationship with their financial advisor. Many times, when a bad actor is seeking to gain control or exploit a senior or vulnerable investor, the bad actor will process an ACATS request in order to avoid an advisor that the senior or vulnerable investor has a familiar and trusted relationship with, and move the investor's assets to an institution where the investor is unknown to the firm's personnel.

Other times, due to the nature of the ACATS system, a member firm may have concerns about an account, and after raising those concerns with the client, the bad actor may hear of those concerns, allowing the bad actor to process an ACATS transfer with an intent to move funds before the member firm is able to take other remedial action.

In both of these cases, the receiving counter-party would have little to no background knowledge of the client and would be unaware of the concerns of the sending member firm. By allowing the sender to notify the receiver of concerns on the account (before or after the transfer takes place), FINRA would remove an effective tool from the bad actor's toolbox. Notably, this permission should be provided even if a hold is never placed on an account – a transfer can often occur before a firm is able to place a hold, especially in cases where the transfer itself is the final action that provides a member firm with a reasonable belief of suspected financial exploitation and the financial advisor or qualified person is not notified of the transfer until after it is executed.

ii. **Reporting to a Trusted Contact or an Immediate Family Member Should be Voluntary and Separate from the Placement of a Hold**

SIFMA supports FINRA's proposal to permit member firms to contact third parties in cases of suspected financial exploitation. However, under proposed Rule 2165(b)(1)(B), member firms are required to notify a trusted contact or an immediate family member within two business days of a hold being placed on an account. This is an unnecessary mandate that does not reflect the realities of many cases of suspected financial exploitation (especially situations which are immediately resolved by initial contact with the client as discussed below), could serve to create more harm than good, and may deter investors from providing trusted contact information. As such, SIFMA respectfully requests FINRA consider adopting a voluntary reporting process for trusted contacts and immediate family members that is separate from the process of placing a hold.

In both the Missouri law and the NASAA proposal, the ability to contact a third-party is separate from the temporary hold process. This is an important development in senior investor protection laws because of the isolation faced by many victims of financial exploitation. According to the National Council on Aging, social isolation is one of the leading factors in the abuse of vulnerable adults[49] (though it is important to note that, generally, social isolation does not mean a complete lack of social relationships, but merely the existence of minimal social contacts which shields perpetrators from scrutiny).[50]

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[49] "Elder Abuse Facts," National Council on Aging, available at: https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/.

[50] *See* "Social isolation in older adults: an evolutionary concept analysis," Nicholson NR, Jr, available at: http://www.ncbi.nlm.nih.gov/pubmed/19291185/; *See Also* "Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America," Hafemeister, Thomas L., available at: http://www.ncbi.nlm.nih.gov/books/NBK98784/.

Often times, the exploitation of seniors and vulnerable investors can be directly prevented by reaching out to one of these trusted individuals in a timely fashion, even before a hold is placed on a transaction. By providing member firms with the ability to contact a trusted third party or immediate family member outside of the hold process, FINRA would provide its members with an additional, effective tool to combat financial exploitation while simultaneously avoiding a possibly detrimental mandate.

One example of this is when the events that provide a member firm with a reasonable belief that there may be ongoing financial exploitation of a client occur in-between transactions.[51] In these cases, the current proposed rules would require the member firm to wait until the next suspect disbursement before reaching out to an immediate family member when no trusted contact is given or the trusted contact is suspected of participating in the exploitation. In these cases, often notifying a client's immediate family member of the suspected exploitation (long before a hold is placed) is the most efficient and effective way to protect the investor. For this reason, it is important that the contact provisions exist separate from Proposed Rule 2165(b)(1)(B)'s hold provisions.

It is also important that any contact of either the trusted contact or an immediate family member be voluntary. Often, a FINRA member firm will identify a suspect transaction, place a hold on the transaction and notify the client. Upon finding out that the person to whom they attempted to transfer assets was not, in fact, their grandson in trouble overseas, the client is pleased with the result and does not pursue the transaction further. There is absolutely no need for the trusted contact to be notified as well, which may cause unnecessary embarrassment for the client or cause the client to revoke the trusted contact designation.

Moreover, requiring a member firm to reach out to an immediate family member under the circumstances outlined in Proposed Rule 2165(b)(1)(B) will likely lead to awkward, potentially harmful situations. In many cases, a senior client's only living immediate family member[52] may be an individual that has little or no role in the client's life.[53] In this case, the immediate family member would be unlikely to provide any assistance in the resolution of the situation, and that contact may actually be harmful. In the most extreme cases, it is a possibility that FINRA would be requiring a member firm to notify an unknown, potential bad actor – who has nothing to do with the current situation – of a client's vulnerability.

Moreover, taking into account the above scenarios, the existence of the mandate in Proposed Rule 2165(b)(1)(B) may actually serve as a deterrent for a client to provide a trusted contact. Knowing that, whenever financial exploitation is suspected and a hold is placed on an account, the trusted contact must be notified within the same time frame as the client, could cause individuals to think twice before providing a contact in writing, especially considering the relatively commonplace scenario where a simple client contact resolves the issue.

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[51] For instance, consider the case of a caregiver who exerts undue influence on a specified individual to make large disbursements every four months, and the member firm receives knowledge of the undue influence days after the latest disbursement is processed. Under the current proposal, the member firm would be required to wait nearly 4 months before reaching out to an immediate family member if no trusted contact was provided (or when the trusted contact is the suspected individual).

[52] As defined in Proposed Rule 2165(a)(5).

[53] An example of this situation would be when the only living immediate family member of a client is an estranged in-law. The FINRA member firm may have no knowledge of the in-law, other than their existence, and would still be required to contact them in certain instances. Worse still, the member firm would still be required to contact the individual under the currently proposed rules even if they are aware of a strained relationship, unless sufficient evidence existed to support a reasonable belief that the in-law would engage in financial exploitation of the senior client.

Alternatively, clients would likely be more willing to provide the information for a trusted contact person if notifying that individual of a potential problem was within the trusted discretion of the member firm; clients generally trust the judgment of their financial advisor (after all, clients regularly entrust their advisor with their wealth, retirement and personal information).

One of the rationales provided by FINRA is that the contact must be mandatory in order to relieve Regulation S-P concerns, as Regulation S-P includes an exemption for legally required contacts.[54] However, because the trusted contact is an individual that is designated for contact by the client, any outreach falls within the Regulation S-P client consent exception,[55] and therefore the act of reaching out to the trusted contact does not need to be mandatory to alleviate such concerns.

Further, as discussed in the introduction section of this letter, FINRA member firms may enter into agreements with their clients detailing in which situations they may reach out to specified individuals. In this instance, the proposed rules could unintentionally supersede a negotiated agreement with a client, even though any contact would be permissive and within the client consent exception of Regulation S-P.

It is for these reasons that we believe the notification of a trusted contact or immediate family member should be both voluntary and separate from the hold provision in Proposed Rule 2165(b)(1)(B).

iii. **The Third Party Contact Provisions Should be Inclusive and All Contact Options Should be Available Once there is a Reasonable Belief of Financial Exploitation**

Currently, the proposed rules contemplate a client providing the name and contact information for a single trusted contact person to the FINRA member. However, the nature of the information delivery and the nature of the contact person are unclear. Member firms serve a vast array of clients across the United States, with varying needs, contact preferences, and circumstances. For this reason, member firms have designed and adopted open and flexible trusted contact policies. The final language of the proposed rules, (particularly the language in Proposed Rule 2165(b)(1)(B)(ii), as well as the proposed amendments to Rule 4512 (discussed later in this letter)) should allow for clients who wish to provide multiple contact persons, or a contact organization (such as the family's law firm or a trusted service organization). The latter part is particularly important because, as discussed above, the most vulnerable investors are also the most socially isolated.

Additionally, each client may have a different comfort level with providing information in a certain way. For this reason, the proposed rules should contemplate situations where a client orally notifies a member firm of a trusted contact, particularly in a case of trusted professionals who owe a higher level of care to the client – such as lawyers, certified public accountants, or health professionals – so long as the client is the one that designates the contact as trusted and the communication is appropriately documented by the member firm. Such flexibility is necessary to ensure that the provision of trusted contacts to member firms is as simple as possible for the greatest number of clients.

54 17 C.F.R §§ 248.15(a)(7)(i).
55 17 C.F.R §§ 248.15(a)(1).

Moreover, once a party is identified as one that the member firm may contact once a reasonable belief of financial exploitation exists, all contact options should be immediately available to the member firm. Currently, Proposed Rule 2165(b)(1)(B)(ii) requires a member firm to notify the Trusted Contact, and if that contact is unavailable or the member reasonably believes that contact to be a part of the exploitation, then (and only then) the member firm is required to attempt to contact an immediate family member.

However, a client's personal situation can often change quite quickly, and the trusted contact person may not be the best individual (or entity) to reach out to. For example, it is not uncommon for seniors to move in with their children or other close relatives at some point during their lives, while designated trusted contacts may move away. Consider a situation where a client provides one of two children as the designated trusted contact person because that child is geographically closest. Within the next several years, and without the client formally updating the trusted contact information, the senior moves in with the non-designated child, and the other takes a new job in another state. All of a sudden, under the proposed rules, the member firm must spend time (possibly days) attempting to contact the distant child before being able to reach out to the child caretaker. In some situations, this could mean two more days that the client is vulnerable to the influence of a bad actor, and while the specific securities transaction may be held, the client could face additional harm nonetheless.

The opposite problem was already discussed in §A(1)(ii) above, where a designated trusted contact is not provided or cannot be reached within the two business day timeframe and the member firm is then required to attempt to notify an immediate family member that has little or no role in the client's life.

Often, it is a member firm that regularly deals directly with the client that is in the best situation to determine which third party they should contact (if any) to bring about the most efficient, effective and beneficial resolution for their client.

For these reasons, SIFMA believes that any trusted contact provision in the proposed rules should ensure the necessary flexibility in who can serve as a trusted contact person (including multiple individuals or an organization), how the client can designate trusted contacts, and which third parties the member firm may contact first (if any).

iv. **The Immediate Internal Review Required by the Proposed Reporting Process is Unnecessarily Duplicative and Confusing**

The requirement for FINRA member firms to "immediately [initiate] an internal review"[56] is unnecessarily duplicative, because the proposed rules already tacitly require firms to initiate an internal review **prior** to the placement of any hold. Once a possibly suspect transaction is identified, firms must initiate an internal review in order to determine if the transaction is in fact suspicious, as well as whether the facts surrounding the transaction rise to the level sufficient to support the placement of a hold or the submission of a report under a given jurisdiction's abuse laws. Specifically, by providing for the placement of a hold when a "Qualified Person reasonably believes that financial exploitation has occurred, is occurring, has been attempted, or will be attempted," the proposed rules already require an internal review to exist to determine whether the facts and circumstances constitute a "reasonable belief."

[56] Proposed Rule 2165(b)(1)(C).

By explicitly requiring an investigation in Proposed Rule 2165(b)(1)(C), the proposed rules create unnecessary duplication and confusion. In some cases, clear situations of financial exploitation exist and a firm will complete a full investigation prior to placing a hold; no further investigation would be necessary in this instance.

2. The Safe Harbor Provisions

i. The Safe Harbor Provision Should Provide Explicit Relief from FINRA Rules

Proposed Rule 2165.01 provides a "safe harbor when they exercise discretion in placing temporary holds on disbursements of funds or securities" for FINRA member firms. SIFMA commends FINRA for including this provision in the proposed rules, strongly supports FINRA efforts in this space, and, for the sake of clarity, respectfully requests that FINRA provide examples of specific rules from which members would receive safe harbor. Specifically, SIFMA suggests that FINRA consider directly referencing, but not limiting the safe harbor to, FINRA Rule 5310.01[57,58] and FINRA Rule 11870.[59]

ii. In Order to Ensure that Senior Investors are Fully Protected, the Safe Harbor Provisions Should be Extended to Member Firms When an Investigation (Governmental or Internal) Reveals Financial Exploitation

As discussed in §A(1)(i) of this letter, the ability for state securities regulators, APS organizations, and law enforcement agencies to investigate cases of suspected financial exploitation is a vital component of an effective senior investor provision. However, many of these organizations routinely face resource challenges, while others (specifically APS organizations in certain states) may not have the authority to investigate suspected financial exploitation. In these cases, it is important that seniors and other vulnerable investors remain protected.

Unfortunately, the only remedy (beyond the hold itself) currently provided in the proposed rules[60] for situations where financial exploitation of an eligible adult is discovered is the receipt of a court order.[61] This means that, under the proposed rules, firms would be required to seek a court order every time financial exploitation is discovered and persists after the time limits provided (for example, when a client continues to insist on making advance-tax payments on their "winnings" from a foreign lottery that she or he never entered). As noted above, senior financial exploitation is a nearly $3 billion industry and this mechanism could add tens of thousands of cases to already overburdened civil courts nationwide.

As discussed in §A(1)(i) above, FINRA member firms routinely identify, investigate and report cases of suspected financial exploitation to the government. However, the proposed rules do not account for a governmental order advising a FINRA member firm to permanently refuse the transaction

[57] FINRA Rule 5310.01 states that, "[a] member must make every effort to execute a marketable customer order that it receives fully and promptly."
[58] Especially if FINRA amends the proposed rules to focus on 'transactions' instead of 'disbursements' as requested in §A(4)(i) below.
[59] FINRA Rule 11870 concerns "Customer Account Transfers."
[60] And the only remedy to which the proposed rules' safe harbor provision applies.
[61] Proposed Rule 2165(b)(3).

(discussed in §A(3)(i) below), nor do they account for a situation where the agencies are unable to investigate or provide guidance to the firm (for whatever reason). When the agencies are not able to investigate, the member firm becomes the default protector of its senior clients, and the next steps (whatever those may be) must be taken by the firm. While some firms may provide for this situation in their individual account agreements (and it is vitally important that the proposed rules reflect an investor's ability to contract for their own protection), it is important that no firm should feel obligated to execute an exploitative transaction.

Currently, should the potentially exploitative transaction persist after the time periods provided for in Proposed Rule 2165, and an investigation has revealed the situation to be exploitative, firms are not specifically covered by the Proposed Rule 2165.01 safe harbor regardless of whether they act in accordance with existing law (in the case of a finding by an agency), in accordance with a customer agreement, or in accordance with a general obligation to protect their clients to the best of their ability.

Further, while it is true that firms that continue a hold beyond the specified time period may later be found by a court, arbitrator or regulator to have acted appropriately in protecting their customer, one of the purposes of the proposed rules appears to be providing firms with some certainty during the period when the customer is most vulnerable, in order to encourage firms to act. However, as proposed, this purpose would be frustrated by requiring firms to seek a court order upon the expiration of the specified time limits in order to obtain said certainty.

If these rules are to have a meaningful effect in protecting senior investors beyond the existing law, and ensure that those investors are sufficiently protected regardless of whether a governmental investigation was conducted, the safe harbor provisions should be extended to cover the final decision of a firm when financial exploitation of an eligible adult is found. It is also important to note that any concerns related to providing member firms with this authority would be easily addressed by allowing the hold to be terminated at any time by the order of an investigating state agency, in addition to a court order in Proposed Rule 2165(b)(1)(2).

iii. Other Necessary Extensions of the Proposed Rule 2165.01 Safe Harbor

It is also important to note that, should FINRA choose to separate the contact provisions from the hold provisions or explicitly include allowing for the disclosure of records to regulators, APS organizations or law enforcement agencies as suggested in §§ A(1)(ii) and A(1)(i) above respectively, the Proposed Rule 2165.01 safe harbor should be extended to include those activities as well.

Additionally, as discussed in §§A(1)(ii) and A(2)(ii) above, §§A(3)(i), B(1) and B(2) below, and the introduction section of this letter, many firms regularly enter into agreements with their clients regarding who they may be able to reach out to, under what circumstances they may be able to reach out to the designated parties, and what information the member firm is allowed to share, as well as what additional actions the firm is permitted or required to take when financial exploitation or fraud is suspected. It is important that any FINRA rule be cognizant of firm's capabilities under existing law – so as not to unintentionally weaken alternative investor protections – and reference those capabilities explicitly. For these reasons, SIFMA urges FINRA to consider recognizing, within the Proposed Rule 2165.01 safe harbor, member firms' ability to develop and implement alternative investor protection structures under existing law (specifically including a client's right to voluntarily enter into an alternative protection structure through agreement with the FINRA member firm).

3. Timeframes

i. The Length of the Hold Should be Extendable in Accordance with Other State or Federal Laws or by Agreement

SIFMA strongly supports the base time frame for the hold provided in Proposed Rule 2165.[62] SIFMA believes that this time frame is of sufficient length to complete most (though not all) investigations into cases of suspected financial exploitation and to account for the different court procedures in jurisdictions across the United States. In fact, in SIFMA's comment letter to NASAA on their proposed Model Act to Protect Vulnerable Adults from Financial Exploitation, SIFMA encouraged NASAA to adopt the base time frames used by FINRA in Proposed Rule 2165(b)(2)-(3).

That being said, SIFMA believes it is important that any final rule does not unnecessarily limit the authority of other securities regulators or government agencies (in accordance with existing laws), or the ability of member firms to enter into agreements with their customers.

As FINRA knows all too well, there is no "one size fits all" solution to investigating fraud and financial exploitation – especially in the complex situations that tend to arise in the financial exploitation of a close relative. Each of these cases is unique and all of them must be approached on a case-by-case basis. While some cases may only require a 2 or 3 day extension, other particularly complex cases may require extensions beyond the timeframe provided in Proposed Rule 2165(b). For this reason, investigating government agencies should be able to provide, and determine the length thereof, an extension beyond the specific time limits set forth in Proposed Rule 2165(b).

Additionally, as the frontline investigators of state securities matters, many state securities regulators are granted broad discretion in the performance of their duties, and the time limits provided in Proposed Rule 2165(b) may serve to effectively curtail the existing authority of the regulator, as member firms seek to comply with FINRA-established time limits.

Moreover, as states begin to implement their own senior investor protection laws, it is important that FINRA member firms receive the safe harbor provided for in Proposed Rule 2165.01 when they act in accordance with an applicable state law. For example, the Delaware senior protection law provides for holds that could last up to 40 business days – 10 business days longer than the time limits provided for in the proposed rules.

FINRA member firms also form agreements with their clients regarding actions that the firm may take in the face of a potentially fraudulent or exploitative transaction, and SIFMA believes that it is important that the proposed rules do not limit an investor's ability to enter into an agreement with a member firm which may provide more robust protections to the investor.

As such, SIFMA respectfully requests that FINRA add the following language to Proposed Rule 2165(b)(2):

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[62] Proposed Rule 2165(b)(2) states that, "(2) The temporary hold authorized by this Rule will expire not later than 15 business days after the date that the Qualified Person first placed the temporary hold on the disbursement of funds or securities, unless […] extended […] pursuant to paragraph (b)(3) of this Rule."

> “(2) The temporary hold authorized by this Rule will expire not later than 15 business days after the date that the **member** ~~Qualified Person~~ first placed the temporary hold on the disbursement of funds or securities, **unless otherwise permitted by state or federal law, through agreement with the specified adult or their authorized representative, or in accordance with prior written client instructions or lawful orders, or** sooner terminated ~~by an order of a court of competent jurisdiction,~~ or extended either by an order of a court of competent jurisdiction or pursuant to paragraph (b)(3) of this Rule.”

Accordingly, SIFMA also respectfully requests that parallel language be included in Proposed Rule 2165.01.

ii. The Two Business Day Limit to Contact All Parties Authorized to Transact Business on an Account is Too Short

Under the currently proposed rules, member firms would have two business days to actively “[provide] notification to”[63] all parties authorized to transact business on the account, as well as the trusted contact person. Moreover, if the trusted contact person is unavailable, the member firm would be required to attempt to contact an immediate family member in that same time period. In addition to the difficulties that this arrangement creates discussed in §§A(1)(ii) and A(1)(iii) above, the two business day limit for contacting all parties authorized to transact business on the account is simply too short. Individual parties can be difficult to reach; the member firm may not have the most up to date mailing address, and some individuals will often fail to return calls. It is not uncommon for it to take more than a week for a member firm to be able to definitively reach a specific individual.

Further, the relatively vague language “all parties authorized to transact business on the account” can be expansive and burdensome. In many cases, senior clients may authorize their many children to transact some limited business, and being required to notify each and every one of them magnifies the difficulty of complying with the proposed time frame. Additionally, should several people be authorized to transact business on an account, it may not be necessary to notify all individuals. For instance, consider a situation where there are five children authorized to transact business on an account in addition to the senior client and the senior client requests a clearly fraudulent disbursement (i.e., making payments to a known scam). Similar to the situations described in §A(1)(ii) above, a short hold and notification of the client (the individual requesting the disbursement) will often resolve the situation almost immediately, defeating the need to contact “all parties.”

As such, SIFMA urges FINRA to consider a notification provision akin to the one found in the Washington State law, which requires firms to make “reasonable efforts” to notify the necessary parties, without placing a specific time limit. As noted above, such flexibility of law is important to allow for the wide variety of potentially exploitative situations which arise. By utilizing similar language, FINRA would change Proposed Rule 2165(b)(1)(B) into a process-based test (of which member firms can control the outcome) from an outcome-based test (of which member firms often cannot control the outcome).

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[63] Proposed Rule 2165(b)(1)(B).

4. The Scope of the Proposed Rules

i. A Focus on Transactions Would Provide Significantly Greater Investor Protections

SIFMA believes that focusing on "disbursements" unnecessarily limits the protections provided by the proposed rules; instead, SIFMA encourages FINRA to consider addressing "transactions" (as in the Delaware law), which would provide significantly more robust protections for senior investors and vulnerable adults. For example, under the current language in proposed rules, should an exploitative liquidation of investments occur, the member firm would only be protected by the proposed rules when they refuse to disburse the fruits of the exploitative sale, but would receive no protections for refusing the initial sale of the investment – an action that can be almost as damaging to an investor as the disbursement, and can trigger significant tax consequences (due to a liquidation of securities or an individual retirement account ("IRA"), for example), fees or other negative financial implications for the senior or vulnerable investor because the transaction may not be suitable or may be inconsistent with a client's risk tolerance, exposing the senior or vulnerable investor to 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 wrong-doer, 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 the reasons discussed in this subsection, as well as in §A(1)(i) above, and for the sake of clarity, SIFMA also requests that FINRA consider explicitly extending the hold process to ACATS transfers.

ii. The Obligations and Safe Harbor of the Proposed Rules Should Apply at the Firm-level, Not the Individual Level

The proposed rules define a "Qualified Person" as "an associated person of a member who serves in a supervisory, compliance or legal capacity that is reasonably related to the Account of the Specified Adult."[64] Under Proposed Rule 2165(b)(1), the "Qualified Person" would be the one that places a temporary hold, however it is the FINRA member firm that is protected by the Proposed Rule 2165.01 safe harbor provision.

Most firms have a pre-determined escalation process for cases of suspected financial exploitation, which involves financial advisors escalating suspicious transactions to supervisory, compliance or legal staff (a "Qualified Person"). However, it is generally considered to be the member firm that places a hold on the account when a Qualified Person has a reasonable belief regarding the financial exploitation of a specified adult, and it is the member firm that FINRA recognizes as having the duty to notify the relevant parties when the hold is placed. On the other hand, it is only the member firm – and not the Qualified Person – that would receive safe harbor for their actions under the proposed rules. As such, and in order to maintain consistency between the permissive action and the safe harbor provision, SIFMA suggests replacing "Qualified Person" with "member" in

[64] Proposed Rule 2165(a)(3).

Proposed Rule 2165(b)(1) and 2165(b)(2), as well as the second mention of "Qualified Person" in Proposed Rule 2165(b)(3).

Additionally, should FINRA choose to separate the ability to notify third-parties from the ability to place a temporary hold, as discussed in §A(1)(ii) above, FINRA should ensure that any such language applies at the member firm-level (as it currently does in Proposed Rule 2165(b)(1)(B)).

7. Definitions

i. "Account" Should be Expanded to Include Accounts for which a Specified Adult is a Named Beneficiary

SIFMA supports the expansion of "account[s]" in Proposed Rule 2165(a)(2) to include accounts where a specified adult is a named beneficiary. There are a number of situations that can occur where a specified adult, as a named beneficiary, is harmed due to fraudulent or exploitative actions by bad actors. Often, a specified adult will develop their retirement plan in equal reliance on both beneficiary and directly-owned assets, and the injury to a senior or vulnerable beneficiary can be just as harmful as an injury to a senior or vulnerable account owner. As such, and in the interest of strong investor protections, SIFMA supports including accounts for which a specified adult is a named beneficiary under the aegis of the proposed rules.

ii. The Definition of "Immediate Family Member" Should be Expanded

SIFMA believes that the definition of "immediate family member" in Proposed Rule 2165(a)(5) should be expanded to include nieces and nephews when used as part of a firm's voluntary outreach. As discussed in §A(1)(ii) above, senior clients often face growing social isolation as they age and FINRA member firms often encounter the "Maiden Aunt" or "Bachelor Uncle" that has outlived their siblings. Often, the only family members these clients have are their nieces and nephews and, given the commonality of this occurrence, SIFMA respectfully requests their inclusion in the definition of "immediate family member." While the mandated contact of nieces and nephews when a hold is placed on a suspect disbursement would place significant burdens on firms, the ability to reach out to nieces and nephews on a voluntary basis would be a strong and effective senior investor protection tool to include in Proposed Rule 2165(a)(5).

iii. The Age Utilized in the Definition of Specified Adult Should be Changed to 60

In order to promote regulatory coordination, SIFMA respectfully requests that FINRA consider adjusting the minimum age for a specified adult to 60. The Elder Justice Act,[65] the Social Security Act,[66] and the Older Americans Act,[67] as well as the Washington State[68] and Missouri[69] senior investor protection laws and the NASAA Model proposal[70] each use the age of 60 as their qualifying

[65] 42 U.S.C. §1397j(5).
[66] Ibid.
[67] 42 U.S.C. §3002(40).
[68] Washington State, Ch. 133, Laws of 2010.
[69] Missouri SB 244, 2015.
[70] NASAA, Notice of Request for Comments Regarding NASAA's Proposed Model Legislation or Regulation to Protect Vulnerable Adults from Financial Exploitation, §2(3).

age for inclusion under the respective laws. As the Elder Justice Act and the Older Americans Act are two of the more prominent laws in the senior protection space, and each of the state senior investor protection laws similar to the proposed rules that utilize age limits use the age of 60, SIFMA believes that utilizing 60 as the minimum age to be included in the proposed protections would serve to advance a more clear, consistent and integrated national protection framework.

iv. Clarification is Needed in the Definition of "Qualified Person"

As discussed in §A(4)(ii) above, SIFMA has suggested that FINRA utilize the term "Qualified Person" in limited situations. However, even should FINRA choose to limit the use of this term as suggested, there has been some concern and confusion expressed amongst FINRA member firms regarding the "reasonably associated with the account" clause in the proposed definition of "Qualified Person."

In particular, there is concern that this language may not be applicable across business models. For example, are Qualified Persons that work in a centralized vulnerable-client department considered to be reasonably associated with an account? What about Qualified Persons on escalation teams that are spread out regionally? Or a Qualified Person who works as the designated senior protection contact for all accounts with no previous relationship to the account?

Any individual that works in a supervisory, compliance, or legal capacity, and is employed by the member firm which holds the Specified Adult's account should be considered "reasonably associated with the account" in order to capture the differing escalation and reporting models across member firms and ensure that any trained and designated supervisor, compliance officer or legal report is authorized to review a possible exploitation situation and take action on behalf of the member firm. If that is the case, the "reasonably associated with the account" language is superfluous and creates unnecessary confusion.

To this end, SIFMA brings your attention to the definition of "Qualified Individual" in the Missouri senior investor protection law: "a person associated with a broker-dealer who serves in a supervisory, compliance, or legal capacity as part of his or her job."

v. Clarification is Requested in the Definition of "Specified Adult"

In addition to the clarifications requested in the definition of "Qualified Person," SIFMA asks that FINRA provide clarification on the proposed definition of "Specified Adult." Specifically, SIFMA would like FINRA to provide greater guidance regarding what it would consider as a "mental or physical impairment" under Proposed Rule 2165(a)(1). For instance, it is unclear as to whether this would include temporary, as well as permanent or chronic impairments.

B. Proposed Amendments to Rule 4512 (Customer Account Information)

1. FINRA Should Provide Guidance on the Collection of a Trusted Contact, as Opposed to Mandating its Collection

Historically, the Trusted Contact form has been one of the more recent innovations in industry efforts to better protect their senior and vulnerable clients. From the beginning, this has been an industry-driven endeavor and has spread quickly throughout many broker-dealers. The form

provides the FINRA member firm the ability to reach out to an individual when the firm has concerns about their client under existing law. Already, this has been an excellent and successful tool in the fight against senior financial exploitation. However, the adoption of the Trusted Contact form has not been universal, and for the reasons discussed below, SIFMA believes that the collection of trusted contact information should be voluntary, and that FINRA should provide guidance to help member firms whose business model is conducive to the use of trusted contact information and that do not yet collect that information.

One of the reasons that the Trusted Contact form has not been adopted by all broker-dealers is that the form is not necessarily suitable for all business models. For instance, there are a number of firms that specialize in low-cost self-directed investing, which relies heavily on technology and provides little to no face-to-face interactions with clients and no dedicated employee that serves a particular client. As such, the knowledge that these member firms have of their client remains strictly at the transactional level. In these situations, collecting a trusted contact from a client would be unreasonable.

Moreover, mandating member attempts to collect trusted contact information on all accounts can be costly and burdensome, with sometimes little beneficial return. Even "just" adding a trusted contact box to client onboarding and upkeep forms requires the development of oversight, tracking and implementation procedures which must then be integrated into existing processes and training modules. Further, Proposed Rule 4512.06 requires an additional disclosure, in writing, that will have to be made to every new and existing client. However, the burden of the disclosure is not limited to the simple production of the document and outreach to the client – it also involves new books and records requirements to ensure that the disclosure is made and to track a client's receipt of that disclosure. For small firms, this can be a time consuming process, while for larger firms it is an extensive requirement that would generate hundreds of thousands of records.

Moreover, depending on a firm's specific business model, there may be little they can do with such information – particularly firms which rely primarily on technology, have little to no regular interaction with their clients, or offer automated advice and investment services.

These issues are further underscored by the awkward mechanism currently in place in the proposed rules. As currently written, the proposed rules require the mandatory collection of information that is only used as part of a voluntary investor protection framework. SIFMA applauds FINRA for recognizing the benefits and necessity of a voluntary reporting and hold process and the different roles played by the different business models among FINRA member firms, and urges FINRA to extend this consideration to the collection of trusted contact information.

For example, the technology-based or technology-centered member firms discussed above may have little ability to use the trusted contact information on the vast majority of accounts, as the information they are able to receive may never be sufficient to give rise to a reasonable belief of financial exploitation. This is particularly true for member firms whose business model primarily relies on providing low-cost self-directed IRAs or automated advice.

For the vast majority of accounts held by such member firms, the only information they regularly receive is the age of the investor and their pattern of trades, which is rarely sufficient to give rise to a reasonable belief – particularly in retirement accounts, which are often characterized by long periods of inactivity punctuated by large transactions when retirement, unemployment, or emergencies

occur. In these instances, the mandatory collection of trusted contact information in Proposed Rule 4512(a)(1)(F) places a significant burden on certain member firms, requiring the attempted collection of information on hundreds of thousands of accounts for which they could never use such information.

However, while the collection of trusted contact information may not be conducive to all business models, SIFMA believes that FINRA has a role in this space. The FINRA rulemaking process is an excellent vehicle to help guide its member firms who wish to implement trusted contact collection on how best to implement these procedures. For instance, some member firms may not realize the benefits of ensuring that the trusted contact be an individual with a close relationship with the client, but with no relationship to the account.

For these reasons, SIFMA urges FINRA to consider changing the proposed amendments to Rule 4512 from active requirements on firms to guidance to help those who do not currently collect trusted contact information set up a process to do so. Further, by ensuring flexibility in the collection of trusted contact information (i.e., the collection of what information, from whom and at what time), FINRA would allow firms with different business models and client bases to develop efficient and effective mechanisms specifically tailored to a firm's structure and their client's needs.

Alternatively, it is important to note that even the firms that have already developed a Trusted Contact form and regularly seek this information from clients have taken years to fully implement the form and the practice of seeking trusted contact information. If Proposed Rule 4512(a)(1)(F) is enacted as currently written, firms will have little to no lead time at all. For this reason, should FINRA maintain the mandatory collection of trusted contact information in Proposed Rule 4512(a)(1)(F), FINRA should be sure to provide firms with sufficient lead time (an estimated 24 months) to fully develop the necessary structures around the collection of trusted contact information.

2. There is No Need to Limit the Information that Could be Shared with a Designated Trusted Contact

Proposed Rule 4512.06 expounds on what information a FINRA member firm can seek to confirm, and does not provide for any information that can be shared with the trusted contact. As discussed in §A(1)(2) above, one of the most effective ways to combat suspected exploitation is to notify the trusted contact of the concerns of the member firm, as opposed to using the trusted contact as a means to confirm information, such as health status, that the member firm may or may not be able to otherwise act on.

The primary purpose of the Trusted Contact – as developed by FINRA member firms and adopted by firms across the industry – is to have the client designate an individual or individuals that the client feels comfortable allowing the member firm to reach out to when warranted by various circumstances. Importantly, this does not always concern a financial exploitation situation – trusted contact permissions can be used to notify trusted designees about capacity-related concerns, to track down an absentee client when a client's holdings are in danger of being escheated to the state, or to request assistance on a client's behalf for more mundane issues (such as transportation).

As such, it is vital that FINRA not limit the specific information which could be discussed with a designated trusted contact as it may unintentionally restrict a FINRA member firm's ability to best serve their unique and varying clients. Moreover, as the trusted contact is, as its name implies, a designated contact that is inherently trusted by the individual (and has no authority to transact business on a client's account), there is little to no danger that any reasonable disclosure would violate a client's trust or give rise to any material issue.

For this reason, SIFMA requests that FINRA remove the restrictions on information that can be discussed with a trusted contact in Proposed Rule 4512.06.

3. Alternatively, FINRA Should Clarify Proposed Rule 4512(a)(1)(F) and 4512.06

Should FINRA choose to keep the proposed amendments to Rule 4512 as active requirements on FINRA member firms, we assume that this would only apply to accounts prospectively. Further, SIFMA respectfully requests that FINRA take sufficient steps to clarify the requirements of Proposed Rule 4512(a)(1)(F) and 4512.06. Questions raised by FINRA member firms include:

- What specifically does "not authorized to transact business on the account" mean?
- As discussed in §A(1)(iii) above, does the trusted contact have to be a particular person? What about an organization or practice? Could there be multiple trusted contacts?
- Also discussed above in §A(1)(iii), is there a particular format in which the contact information needs to be supplied? Would verbal confirmation that an individual is a trusted person be sufficient for a member firm to document the individual as a trusted contact?
- In what ways could the disclosure requirement in Proposed Rule 4512.06 be met? SIFMA suggests FINRA consider adding language that the required disclosure could be met by including the disclosure within the account agreement, within the firm's privacy policy, or within the form by which the client may designate a trusted contact person.
- What would constitute "reasonable efforts" under Proposed Rule 4512.06? SIFMA suggests FINRA consider providing examples, including providing a place to designate a trusted contact person within new account forms (paper or electronic).
- Would the "reasonable efforts" requirement from Proposed Rule 4512.06 apply to accounts opened after the proposed rules become effective?

Thank you again for the opportunity to comment on the proposed rules, which is a testament to FINRA's steadfast commitment to protecting senior and vulnerable investors. SIFMA looks forward to working together on this and future senior investor protection efforts, and would be happy to answer any questions, provide any additional information you seek or otherwise discuss our comments with you; please do not hesitate to contact either the undersigned or Kyle Innes at kinnes@sifma.org or 212-313-1211.

Sincerely,

Lisa Bleier
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