EVERSHEDS SUTHERLAND

Eversheds Sutherland (US) LLP
1114 Avenue of the Americas, 40th Floor
New York, NY 10036-7703

D: +1 212.389.5052
F: +1 212.389.5099

cliffordkirsch@
eversheds-sutherland.com

October 8, 2019

Via E-Mail

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: FINRA Regulatory Notice 19-27
FINRA Requests Comment on Rules and Issues Relating to Senior Investors

Dear Ms. Mitchell:

We are submitting this letter on behalf of our client, the Committee of Annuity Insurers (the "Committee"),[1] in response to FINRA Regulatory Notice 19-27 *FINRA Requests Comment on Rules and Issues Relating to Senior Investors* (the "Notice"), issued by the Financial Industry Regulatory Authority, Inc. ("FINRA") on August 9, 2019.[2] The Notice solicits comment on the effectiveness and efficiency of FINRA's rules and administrative processes that help protect senior investors from financial exploitation, and whether additional tools, guidance or changes are appropriate to further address suspected financial exploitation and other circumstances of financial vulnerability for senior investors.

BACKGROUND

FINRA Rule 4512. FINRA Rule 4512 requires members to make reasonable efforts to obtain the name and contact information for a Trusted Contact Person upon the opening of a non-institutional customer's account or when updating account information for a non-institutional account. The rule does not prohibit members from opening and maintaining an account if a customer fails to identify a Trusted Contact Person as long as the member makes reasonable efforts to obtain the information. The rule also requires that, at the time of account opening, a member disclose in writing (which may be electronic) to the customer that the member or an associated person is authorized to contact the Trusted Contact Person and disclose information about the customer's account to address possible financial exploitation, to confirm the specifics of the customer's current contact information, health status, or the identity of any legal guardian, executor, trustee or holder of a power of attorney, or as otherwise permitted by FINRA Rule 2165.

---

[1] The Committee is a coalition of many of the largest and most prominent issuers of annuity contracts. The Committee's 31 member companies represent more than 80% of the annuity business in the United States. The Committee was formed in 1981 to address legislative and regulatory issues relevant to the annuity industry and to participate in the development of insurance, securities, banking, and tax policies regarding annuities. For over three decades, the Committee has played a prominent role in shaping government and regulatory policies with respect to annuities at both the federal and state levels, working with and advocating before the SEC, CFTC, FINRA, IRS, Treasury Department, and Department of Labor, as well as the NAIC and relevant Congressional committees. A list of the Committee's member companies is attached as Appendix A.

[2] The Notice is posted at https://www.finra.org/rules-guidance/notices/19-27.

Eversheds Sutherland (US) LLP is part of a global legal practice, operating through various separate and distinct legal entities, under Eversheds Sutherland. For a full description of the structure and a list of offices, please visit www.eversheds-sutherland.com.

FINRA Rule 2165. FINRA Rule 2165 permits a member firm that reasonably believes that financial exploitation[3] has occurred, is occurring, has been attempted or will be attempted to place a temporary hold on the disbursement of funds or securities from the account of a "Specified Adult" customer.[4] If a member places a temporary hold, FINRA Rule 2165 requires that the member immediately initiate an internal review of the facts and circumstances that caused the member to reasonably believe that financial exploitation of the Specified Adult has occurred, is occurring, has been attempted or will be attempted. In addition, the rule requires the member to provide notification of the hold and the reason for the hold to the Trusted Contact Person and all parties authorized to transact business on the account, including, but not limited to, the customer, no later than two business days after the date that the member firm first placed the hold. A member firm is not required to provide notification to the Trusted Contact Person or a party authorized to transact business on an account, respectively, if the Trusted Contact Person or party is unavailable or the member reasonably believes the Trusted Contact Person or party has engaged, is engaged, or will engage in the financial exploitation of the Specified Adult.

The temporary hold authorized by FINRA Rule 2165 expires not later than 15 business days after the date the member firm first placed the temporary hold on the disbursement of funds or securities, unless otherwise terminated or extended by an order of a state regulator or agency or court of competent jurisdiction. In addition, provided that the member firm's internal review of the facts and circumstances supports its reasonable belief that the financial exploitation of the Specified Adult has occurred, is occurring, has been attempted or will be attempted, the rule permits the member firm to extend the temporary hold for an additional 10 business days, unless otherwise terminated or extended by an order of a state regulator or agency or court of competent jurisdiction.

FINRA Rule 2165 also requires members to retain records related to compliance with the rule, which must be readily available to FINRA upon request. Members must keep records of: (1) requests for disbursement that may constitute financial exploitation of a Specified Adult and the resulting temporary hold; (2) the finding of a reasonable belief that financial exploitation has occurred, is occurring, has been attempted or will be attempted underlying the decision to place a temporary hold on a disbursement; (3) the name and title of the associated person that authorized the temporary hold on a disbursement; (4) notification(s) to the relevant parties pursuant to the rule; and (5) the internal review of the facts and circumstances supporting the member firm's reasonable belief that the financial exploitation of the Specified Adult has occurred, is occurring, has been attempted or will be attempted.

COMMITTEE COMMENTS

The Committee appreciates the opportunity to submit comments in response to the Notice. The Committee is very pleased that FINRA has undertaken a retrospective review of the effectiveness and efficiency of FINRA's rules and administrative processes that help protect senior investors from financial exploitation. The Committee offers the following specific comments in response to the Notice.

---

[3] "Financial exploitation" includes: (A) the wrongful or unauthorized taking, withholding, appropriation, or use of a Specified Adult's funds or securities; or (B) any act or omission taken by a person, including through the use of a power of attorney, guardianship, or any other authority, regarding a Specified Adult, to: (1) obtain control, through deception, intimidation or undue influence, over the Specified Adult's money, assets or property; or (2) convert the Specified Adult's money, assets or property.

[4] A "Specified Adult" is (A) a natural person age 65 and older or (B) a natural person age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests.

Initial Notice Requirements. The Notice requests comment on how FINRA can make rules, guidance or attendant administrative processes related to senior investors more efficient and effective.[5]

As noted above, FINRA Rule 2165 requires a member firm, no later than two business days after the date that a member firm first placed a temporary hold on the disbursement of funds or securities, to provide oral or written notice of the temporary hold and the reason for the temporary hold to: (1) all parties authorized to transact business on the customer's account; and (2) the Trusted Contact Person(s).

Committee member companies have found the two-business day requirement to be an insufficient length of time in which to conduct an internal investigation which may support a finding that a Trusted Contact Person or family member is responsible for financial exploitation or is a contributing party. There is concern that the notice required by Rule 2165 could be received or intercepted by an individual (e.g., a family member or power of attorney) who a member firm reasonably believes has engaged, is engaged, or will engage in the financial exploitation of the Specified Adult. The Committee believes that 4-5 business days would provide a more realistic timeline for the internal deliberation that is necessary prior to providing the required notice.

Extension of Temporary Holds on Disbursements. The Notice requests comment on whether FINRA should extend the temporary hold period in the rule or create a different mechanism to obtain an extension.[6]

Committee member companies have found that placing a temporary hold on a specified customer's account for up to 15 business days does not provide adequate time for a member firm to reach a resolution as to whether financial exploitation has occurred, is occurring, has been attempted or will be attempted. In its collective experience, Committee member companies note that investigations of financial exploitation often take longer than 15 business days. Internal investigations may take several weeks or more to complete. And while establishing a window of 30 business days would be beneficial to member firms, it would not be ideal for customers.

Additionally, Committee member companies have also found that placing a temporary hold on a specified customer's account for up to 15 business days does not provide adequate time for a state adult protective services agency or similar agency to reach a resolution as to whether financial exploitation has occurred, is occurring, has been attempted or will be attempted. Furthermore, in situations where a member firm engages a state adult protective services agency or similar agency, the agency is not required to share details of its internal investigations. As a result, member firms may not know the final outcome of a report of suspected financial exploitation.

The Committee acknowledges that FINRA's rule must balance the interests of permitting customers access to their accounts and protecting customers from financial exploitation when determining the length of temporary holds. The Committee believes that permitting a firm to place a temporary hold on a specified customer's account for up to 20 business days, with an extension for up to 10 business days, appropriately balances these interests.

Extending Protection. The Notice requests comment on whether the safe harbor under FINRA Rue 2165 should be extended to apply where there is a reasonable belief that the customer has an impairment that renders the individual unable to protect his or her own interests (e.g., a cognitive impairment or diminished capacity), irrespective of whether there is evidence that the customer may be the victim of financial exploitation by a third party.[7]

[5] See the Notice at Question #18.
[6] See the Notice at Question #3.
[7] See the Notice at Question #2.

The Committee believes that the safe harbor under FINRA Rule 2165 should be extended to apply where there is a reasonable belief that the customer has an impairment that renders the individual unable to protect his or her own interests, irrespective of whether there is evidence that the customer may be the victim of financial exploitation by a third party. The Committee notes that state laws vary on providing protection where there is a reasonable belief that the customer has an impairment that renders the individual unable to protect his or her own interests.[8] As a first step in determining whether customers would be best served by a FINRA rule that creates a federal-level permission for broker-dealers to place temporary holds on customer funds and securities in cases where there may be no third party exploitation, the Committee believes it would be helpful if FINRA published research on the various state laws in this area and then began a discussion with member firms and the North American Securities Administrators Association (NASAA) regarding how these related laws inform and impact the issue. Extending the safe harbor would provide consistent protections for customers of member firms, regardless of their state of residence.

The Notice also requests comment on the burdens that would be placed on member firms and their registered persons if the safe harbor were extended to apply where there is a reasonable belief that the customer has an impairment that renders the individual unable to protect his or her own interests.[9] As noted above, there are some states that either permit or require reporting suspected financial exploitation of senior investors. These laws and regulations include varying definitions, as well as varying degrees of reporting, notice, and hold requirements. If the safe harbor under FINRA Rule 2165 is extended, FINRA member firms may be burdened with determining whether state reporting requirements conflict with FINRA's rule. For this reason, the Committee believes that any extension of the rule to cover non-third party situations should make clear that member firms are not picking up new obligations under state law by virtue of exercising a right under FINRA rules to place a temporary hold on the transfer of funds and securities in non-third party situations.

Sharing Trusted Contact Person Information. The Notice requests comment on what additional guidance, tools or resources would be helpful to firms or the investing public to address suspected financial exploitation and other circumstances of financial vulnerability for senior investors.[10]

As noted above, FINRA Rule 2165 requires a firm, not later than two business days after the date that a firm first placed a temporary hold on the disbursement of funds or securities, to provide oral or written notice of the temporary hold and the reason for the temporary hold to the Trusted Contact Person(s). The Notice requests comment on: (1) the methods firms have used in seeking to obtain Trusted Contact Person information; (2) the methods firms have found most helpful in obtaining Trusted Contact Person information; and (3) the response rates from new and existing customers in providing Trusted Contact Person information.

The Committee notes that there may be instances when a retail customer may benefit from a member firm sharing Trusted Contact Person information with other financial institutions which provide products or services to the retail customer. Assuming that a member firm first makes contact with Trusted Contact Person(s), the Committee requests that FINRA provide guidance on the extent to which a member firm is then permitted to share Trusted Contact Person information with other financial institutions with whom they share customers, and whether such financial institutions are permitted to reach out to Trusted Contact Person(s). Currently, Regulation S-P provides that member firms may disclose nonpublic personal information about a

[8] See, e.g., Am. Bar Ass'n, Capacity Definition & Initiation of Guardianship Proceedings, https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartcapacityandinitiation.pdf (noting various state definitions of "incapacity" and various state rules on who may initiate guardianship proceedings).
[9] See the Notice at Question #2.
[10] See the Notice at Question #19.

customer in certain instances. The Committee believes that such sharing of Trusted Contact Person information is analogous to the sharing of consumer information under Regulation S-P, and asks that FINRA confirm this in guidance.

Coordination with State Adult Protective Services Agencies. The Notice also requests comment on whether there are areas where FINRA or the FINRA Investor Education Foundation should conduct additional research or publish additional materials to promote greater awareness and education.[11]

Also as noted above, the Committee has found that placing a temporary hold on a specified customer's account for up to 15 business days does not provide adequate time for a member firm or state adult protective services agency or similar agency to reach a resolution as to whether financial exploitation has occurred, is occurring, has been attempted or will be attempted. As noted above, state adult protective services agencies or similar agencies may investigate reports of financial exploitation for several months. Furthermore, it can be difficult to obtain an extension of a temporary hold from a state agency or a court. The Committee asks that FINRA coordinate with state adult protective services agencies or similar agencies to improve its understanding of the investigation process for financial exploitation, so that FINRA can further align its rules to take into account this process. Furthermore, FINRA should coordinate with state adult protective services agencies or similar agencies to improve the sharing of information between state adult protective services agencies or similar agencies and member firms, in order to document final outcomes of investigations of financial exploitation. Doing so is likely to improve a member firm's insight into local investigations, which in turn would allow the member firm to better protect its customers.

CONCLUSION

The Committee appreciates the opportunity to provide these comments on the Notice. Please do not hesitate to contact Clifford Kirsch (212.389.5052 or CliffordKirsch@eversheds-sutherland.com), Eric Arnold (202.383.0741 or EricArnold@eversheds-sutherland.com), or Holly Smith (202.383.0245 or HollySmith@eversheds-sutherland.com) with any questions or to discuss this comment letter.

[11] See the Notice at Question #19.

THE COMMITTEE OF ANNUITY INSURERS

AIG
Allianz Life
Allstate Financial
Ameriprise Financial
Athene USA
AXA Equitable Life Insurance Company
Brighthouse Financial, Inc.
Fidelity Investments Life Insurance Company
Genworth Financial
Global Atlantic Financial Group
Great American Life Insurance Co.
Guardian Insurance & Annuity Co., Inc.
Jackson National Life Insurance Company
John Hancock Life Insurance Company
Lincoln Financial Group
Massachusetts Mutual Life Insurance Company
Metropolitan Life Insurance Company
National Life Group
Nationwide Life Insurance Companies
New York Life Insurance Company
Northwestern Mutual Life Insurance Company
Ohio National Financial Services
Pacific Life Insurance Company
Protective Life Insurance Company
Prudential Insurance Company of America
Sammons Financial Group
Symetra Financial Corporation
Talcott Resolution
The Transamerica companies
TIAA
USAA Life Insurance Company