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Client Alert

Americas FS Regulatory Center of Excellence

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Now is the time to prepare for new customer protection rules covering seniors and other vulnerable adults

The U.S. Census Bureau projects that between now and 2030, the percentage of the population aged 65 and over (seniors) will nearly double to reach 20 percent, with the fastest growing portion among those aged 85 or more. Based on calls to its Securities Helpline for Seniors, which have highlighted the risk of financial exploitation that this group of investors faces, the Financial Industry Regulatory Authority (FINRA) has finalized new rules providing broker/dealers (FINRA's member firms) with the ability to respond to situations in which they suspect a senior might be at risk of financial harm. The number of these incidences is expected to increase commensurate with the growth in the senior population.

As announced in FINRA Regulatory Notice 17-11, beginning February 2018, a new FINRA rule (FINRA Rule 2165, Financial Exploitation of Specified Adults) and changes to FINRA Rule 4512 (Customer Account Information) will go into effect establishing investor protections for "specified adults", including seniors and other adults aged 18 and older who are unable to protect their own interests due to a mental or physical impairment. The protections allow, but do not require, FINRA member firms to place temporary holds of up to 15 business days on disbursements of funds or securities from the accounts of "specified adults" when they have a "reasonable belief" that the customer may be or has been harmed by financial exploitation. To prevent misapplication of the temporary hold, the Rule 2165 requires firms to:

- Immediately initiate an internal review of the facts and circumstances leading to the suspicions of financial exploitation of the customer.
- Notify within 2 business days all parties authorized to transact business on the account as well as the trusted contact named on the account (discussed more fully below) unless a party or the trusted contact is unavailable or is "reasonably believed" to be involved in the financial exploitation.
- Establish written policies and procedures related to financial exploitation of specified adults, addressing:
  - Identification, escalation, and reporting;
  - Training policies and programs;
  - Designation of persons authorized to place, terminate, or extend temporary holds; and
  - Retention of records.

Also beginning February 2018, changes to FINRA Rule 4512 will require firms to "reasonably

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attempt" to obtain the name of a trusted contact person for all non-institutional customer accounts, including specified adults. Such requests must be made at an initial account opening or when updating an existing customer's account and periodically thereafter. The trusted contact can serve several purposes. For example, in the case of seniors, if a firm has been unable to contact a customer after multiple attempts it could contact the trusted contact person to inquire about the customer's health status. A firm also could reach out to a trusted contact person if it suspects that the customer may be suffering from Alzheimer's disease, dementia or other forms of diminished capacity that could leave them more susceptible to exploitation.

Firms that exercise their discretion to place a temporary hold in accordance with Rule 2165 are provided a safe harbor from FINRA Rules 2010 (Standards of Commercial Honor and Principles of Trade), 2150 (Improper Use of Customers' Securities or Funds), and 11870 (Customer Account Transfer Contracts).

Considerations

FINRA anticipates its Rule 2165 and amendments to Rule 4512 will aid in the creation of a uniform national standard.

Financial services professionals are generally held to a fiduciary-like duty to protect seniors and certain others customers from financial harm. At both the federal and state levels, legislators and regulators have sought to increase awareness of the growing issue of senior financial exploitation across the financial services industry by focusing on: i) increased reporting (either mandatory or voluntary) of suspected financial exploitation to law enforcement, government authorities and/or designated third parties, and ii) targeted training of financial services professionals to increase recognition of certain indicators, or "red flags" of potential financial exploitation. A notable example is the Department of the Treasury's requirement to file a Suspicious Activity Report (SAR) with its Financial Crimes Enforcement Network (FinCEN) in cases of suspected "elder financial exploitation" and FinCEN's related "red flags" guidance.

Sustained by demographic trends, pressure to protect seniors and other "vulnerable" adults from financial harm is likely to increase across all retail consumer financial products and services for the next several years. Along with broker-dealers, financial services organizations are encouraged to strengthen and enhance their compliance and risk management programs for senior financial protection by considering the measures raised by FINRA's new rules, including:

- Escalation and reporting parameters and procedures.
- Thresholds for action, including designation of persons with authority to take action; documentation requirements to support a "reasonable belief of financial exploitation;" correlations with SAR filings; identification of a "trusted contact;" and age-related account monitoring.
- Federal, state, and local reporting requirements (mandatory or voluntary).
- Training programs on the identification of "red flags."
- Opportunities to introduce new senior-friendly features to current product and services offerings.
- Potential conflicts of interest posed by retail sales programs targeting senior investors.
- Privacy considerations arising from disclosure of client or account-related information to a trusted contact.

For additional information, please contact:

Deborah Bailey
Managing Director
Americas Financial Services Regulatory Center of Excellence
Financial Services Regulatory Risk Practice
T: 212-954-0897
E: dpbailey@kpmg.com

Amy Matsuo
Principal and National Lead
Financial Services Regulatory Risk Practice
T: 919-380-1509
E: amatsuo@kpmg.com

Tracy Whille
Principal
Financial Services Regulatory Risk
Securities and Investment Management
T: 212-954-2691
E: twhille@kpmg.com

Authors:

Tracy Whille, Principal, Financial Services Regulatory Risk, Securities and Investment Management

Daniel Haff, Director, Financial Services Regulatory Risk, Securities and Investment Management

Karen Staines, Director, Americas FS Regulatory Center of Excellence

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