Cetera FINANCIAL GROUP

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Submitted Via Email to *pubcom@finra.org*

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Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Proposed FINRA Rules 4512 and 2165 - Financial Exploitation of Seniors and Other Vulnerable Adults

Dear Ms. Asquith:

Cetera Financial Group, Inc. ("Cetera") appreciates the opportunity to respond to FINRA's request for comment on Regulatory Notice 15-37 ("RN 15-37" or the "Proposal"), which proposes rules addressing the financial exploitation of seniors and other vulnerable adults. Cetera is the holding company for or is affiliated with ten FINRA-member, independent channel broker-dealers,[1] with approximately 9,400 total financial advisors. Cetera's broker-dealers conduct retail business and serve a diverse range of customers, including seniors and other customers affected by this Proposal.

RN-15-37 proposes (1) amendments to FINRA Rule 4512 (Customer Account Information) to require firms to make reasonable efforts to obtain the name of and contact information for a trusted contact person for a customer's account; and (2) the adoption of new FINRA Rule 2165 (Financial Exploitation of Specified Adults) to permit qualified persons of firms to place temporary holds on disbursements of funds or securities from the accounts of specified customers where there is a reasonable belief of financial exploitation of these customers.

Cetera commends FINRA for its attention to this group of potentially at-risk customers. The Proposal is helpful in that it provides direction and, in certain circumstances, a safe harbor, to a firm that desires to help prevent suspected financial exploitation. However, Cetera is concerned that there is a lack of clarity in certain instances in the proposed rules, the Proposal may result in potential liability to members and their employees, and the Proposal may conflict with state laws, as outlined herein.

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[1] Cetera Advisors LLC, Cetera Advisor Networks LLC, Cetera Investment Services LLC, Cetera Financial Specialists LLC, First Allied Securities, Inc., Summit Brokerage Services, Inc., Investors Capital Corp., Legend Equities Corp., Girard Securities, Inc. and VSR Financial Services, Inc.

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I. Firm Employees Should Be Protected from Liability.

As proposed, Rule 2165 states that if a Qualified Person reasonably believes that financial exploitation has occurred, is occurring, has been attempted, or will be attempted, the "*Qualified Person* may place a temporary hold on a disbursement of funds or securities…" (emphasis added). The term "Qualified Person" is defined 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." Cetera is concerned that, rather than providing a safe harbor, such wording could be interpreted to impose a duty, and therefore potential liability, on member firms' employees. For example, if it is discovered that a firm's customer is the victim of financial exploitation, the proposed wording of Rule 2165 could lead to a private action against any "Qualified Person," if the victim or his or her representatives assert that such person should have exercised his or her right to delay disbursements under the rule.[2]

To better protect firms' employees, Cetera believes that any rights granted under proposed Rule 2165 should be granted to the firm, and not to individual employees, especially since employees in the listed roles would not typically have direct contact with clients. Rather, supervisors, attorneys and compliance personnel would often be relying on a registered representative's account of his or her interactions with a client.

II. It Is Unclear What Constitutes a "Reasonable Belief" Under Proposed Rule 2165.

Rule 2165 does not provide guidance as to what constitutes a reasonable belief that: (i) financial exploitation has occurred or has been attempted; or (ii) a customer has a mental or physical impairment that renders the individual unable to protect his or her own interests. Such determinations are inherently subjective and, with respect to the latter and according to the Proposal, may be based on "facts and circumstances observed in the member's business relationship" with the person.

The proposed rule would essentially require a firm to act as a trier of fact; however, firms generally would not have the expertise to make determinations on either of the above-noted issues. A firm's decision on such subjective issues, either way, would create the potential for clients to dispute the "reasonableness" of a firm's actions.

In particular, a determination as to financial exploitation could be problematic for a firm. "Financial exploitation" is defined in the proposed rule to include "the wrongful or unauthorized taking, withholding, appropriation, or use of a Specified Adult's funds or securities." A reasonable belief that such an act has occurred, or will occur, would entail significant fact finding

[2] While violation of FINRA Rules is often determined not to be grounds for a private cause of action, it is nevertheless common for claimants in arbitration to cite a violation of FINRA Rules as the basis for compensation.

and record keeping on the part of member firms. For example, inherent in a determination of financial exploitation is determining the intended use of funds to be withdrawn from an account. A firm that investigates for financial exploitation, and intends to take advantage of the safe harbor, would seemingly be required to inquire as to a client's intended use of funds when a disbursement is requested. Such a practice would be fraught with issues and uncertainties, as it would force a firm to make a subjective determination as to what is and is not an appropriate use of funds. Such an inquiry is quite different from the typical fact finding undertaken by firms when recommending investments or investment strategies, and would require new policies and procedures, new expertise and new record keeping.

To comply with this rule and avoid client disputes, is it contemplated that firms would need to either retain outside experts or hire a specialist dedicated to these issues? Such a requirement would significantly increase the cost of compliance with this rule. In the absence of expert guidance or further clarification from FINRA, firms could potentially be pressured to "err on the side of caution" and hold disbursements when such action otherwise may not be warranted. The potential for unwarranted delays in disbursements could harm customers who are not victims of financial exploitation. Additionally, various firms would likely apply different "reasonable belief" standards, which could result in disparate application of the rule throughout the industry.

III. Firms Could Be Subject to Liability Whether or Not Disbursements Are Delayed.

Because of the competing interests in any given transaction, the right to delay disbursements could subject a firm to liability whether or not it chooses to exercise this right, as illustrated in the scenarios below.

If, pursuant to Rule 2165, a Qualified Person were to place a temporary hold on a disbursement and the member firm were to make all required notifications, the hold would simply expire in 15 business days, unless sooner terminated by a court or extended by either a court or the Qualified Person. Even if extended by the Qualified Person, the hold would expire in an additional 15 days in the absence of a court action.

It is unclear what is expected from the firm and the Qualified Person during the temporary hold. Rule 2165 would require that the firm notify the Trusted Contact Person and all parties authorized to transact business on the account, unless such persons are suspected of engaging in the exploitation. It is implied, but perhaps should be explicitly stated, that those notified individuals (rather than the firm) would then have responsibility for taking action in court or notifying any applicable state agencies of the suspected exploitation. Similar proposed state legislation has given firms the option to notify a state agency, which seems to better clarify the transfer of the matter from the firm to an agency that is empowered to address the financial exploitation. To that point, FINRA may consider whether state legislation, as opposed to a FINRA rule, is a more effective approach for addressing financial exploitation of seniors and vulnerable adults.

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Rule 2165 would also require that the firm undertake an internal investigation; but if, after such an investigation, the firm and Qualified Person still reasonably believe that financial exploitation will occur, is the firm nonetheless required to process the disbursement if the court has not acted, including in scenarios where the Trusted Contact Person doesn't take action to protect the client? A disbursement in these circumstances could lead to a private action against the firm. Meanwhile, in this scenario, the firm is also subject to liability to the client, who may allege that the delay is wrongful under state law. Cetera appreciates the safe harbor provided in the Supplementary Material to Rule 2165, but notes that while such safe harbor may protect a firm from enforcement of FINRA Rules, it would not necessarily prevent a firm's liability under applicable state laws.

Alternatively, if a firm declines to delay a disbursement, despite having a reasonable belief that financial exploitation is occurring, a client or his or her representatives may claim that the firm had a duty to exercise its rights under Rule 2165. Cetera supports the permissive nature of proposed Rule 2165, but sees potential that it may not be construed as such.

IV. The Proposed Rules May Contradict State Law.

There is a significant possibility that compliance with the proposed rules could be contrary to applicable state laws. For example, laws in certain states may not permit a broker-dealer to deny a client access to his or her property. Another potential conflict with state laws lies in the definition of "financial exploitation," which includes deceptive acts taken through the use of a power of attorney, guardianship or other authority. In some states, it is illegal to deny the authority of an attorney-in-fact. Finally, NASAA's proposed model rule on this issue would permit an initial delay on a disbursement for up to 10 days, with a possible extension for an additional 10 days. Such timing would contradict the 15-day initial delay and extension proposed by FINRA.

In each of the examples above, firms would face the dilemma of choosing between complying with a state law (and risking liability, as described in Section III) or taking advantage of the safe harbor provided by FINRA. It is unlikely that compliance with a FINRA rule would be deemed compliance with a state law that may be contrary.

V. The Minimum Age for "Specified Adults" Should Be Reconsidered.

Rule 2165 would cover any person over the age of 65, which would include many individuals under the typical age of retirement. Cetera notes that some customers at or near age 65 may take offense to being included in the definition of "Specified Adult" for purposes of this rule, and encourages FINRA to consider whether this minimum age should be raised.

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VI. Conclusion

Cetera appreciates the opportunity to comment on this Proposal and commends FINRA for bringing attention to the issue of elder abuse. We encourage FINRA to consider the issues raised in this letter and to perhaps coordinate efforts with state agencies and authorities, who share our common goal of preventing this type of abuse.

Thank you for your consideration of these comments. If you have any questions or would like further information, please contact me at (310) 257-7474 or deidre.link@cetera.com.

Respectfully submitted,

Deidre D. Link