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November 30, 2015

VIA ELECTRONIC MAIL

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

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

Dear Ms. Asquith:

We are submitting this letter on behalf of our client, the Committee of Annuity Insurers (the "Committee"),[1] in response to Regulatory Notice 15-37, *Financial Exploitation of Seniors and Other Vulnerable Adults* (the "Notice," or "RN 15-37") issued by the Financial Industry Regulatory Authority, Inc. ("FINRA").[2] The Notice requests comments on a proposed amendment to FINRA Rule 4512 (Customer Account Information) ("Rule 4512") and adoption of new FINRA Rule 2165 (Financial Exploitation of Specified Adults) ("Rule 2165," sometimes referred to together with Rule 4512 as the "Proposed Rules").

THE PROPOSED RULES

The Notice indicates that the Proposed Rules are intended to address the financial exploitation of seniors and other vulnerable adults. Rule 4512 would be amended to impose a duty on firms to make a reasonable effort to obtain the name and contact information of a "trusted contact person" for any non-institutional account. Under Rule 2165, FINRA would permit, *but not require*, "qualified persons" of a firm to place a temporary hold on disbursements of funds or securities from the accounts of certain "specified adults" where there is a reasonable belief of "financial exploitation" of those adults. The Notice indicates that the Proposed Rules

[1] The Committee was formed in 1982 to address legislative and regulatory issues relevant to the annuity industry and to participate in the development of securities, banking, and tax policies regarding annuities. For three decades, the Committee has played a prominent role in shaping government and regulatory policies with respect to annuities, working with and advocating before the SEC, CFTC, FINRA, IRS, Treasury, Department of Labor, as well as the NAIC and relevant Congressional committees. Today the Committee is a coalition of many of the largest and most prominent issuers of annuity contracts. The Committee's member companies represent more than 80% of the annuity business in the United States. A list of the Committee's member companies is attached as Appendix A.

[2] RN 15-37 is available at http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-15-37.pdf .

will now explicitly permit firms to reach out to a trusted contact person or put a temporary hold on the disbursement of funds under certain circumstances.

Rule 4512. Rule 4512 would be amended to require that each firm make reasonable efforts to obtain the name and contact information of a "trusted contact person who may be contacted about the customer's account." Under newly proposed Supplementary Material .06 ("SM.06"), firms would be required to disclose to the customer, in writing, that the firm or an associated person is authorized to contact the trusted contact and disclose account information in order to confirm: (1) the customer's current account information; (2) the customer's health status; and (3) the identity of any legal guardian, executor, trustee, or holder of a power of attorney. In addition, the proposed amendments to Rule 4512 would permit the firm or an associated person to reach out to the trusted contact as permitted under Rule 2165.

RN 15-37 makes clear that firms would have no obligation under Rule 4512 to reach out to currently existing account owners to identify a trusted contact person, and that a firm should undertake reasonable efforts to obtain the identity of a trusted contact person "as the firm updates the information for the account either in the course of the firm's routine and customary business or as otherwise required by applicable laws or rules." In addition, RN 15-37 indicates that Rule 4512 would not require that the trusted contact person be notified by the firm of his or her status as a trusted contact person, but would leave that determination to the firm.

Rule 2165. Proposed Rule 2165 would permit a "qualified person" to place a temporary hold on a disbursement of funds or securities from the account of a "specified adult" if the qualified person reasonably believes that "financial exploitation" of the specified adult has occurred, is occurring, has been attempted or will be attempted. Rule 2165 includes the following critical definitions:

> *Qualified Person*: 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;
>
> *Specified Adult*: (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; and
>
> *Financial Exploitation*: (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: (i) obtain control, through deception, intimidation or undue influence, over the Specified Adult's money, assets or property; or (ii) convert the Specified Adult's money, assets or property.

Once a firm places a hold on the disbursement, Rule 2165 would require that the firm: (1) immediately initiate an internal review of the facts and circumstances that created the concern that financial exploitation was at issue; and (2) provide notice of the hold and the reason for the

hold to all parties authorized to transact business on the account and the trusted contact person (if available) no later than two business days after placing the hold. The temporary hold would be permitted for 15 business days, but if the firm's internal review indicates the existence of financial exploitation, then the hold may be extended for an additional 15 days.

Supplementary Material .01 to Rule 2165 ("SM.01") provides firms with a "safe harbor when they exercise discretion in placing temporary holds on disbursements of funds or securities from the account of a specified adult."

Rule 2165 and the related Supplementary Material would also impose recordkeeping and training duties on firms, and require firms to adopt written supervisory procedures related to financial exploitation of seniors and vulnerable customers.

COMMITTEE COMMENTS

The Committee appreciates the opportunity to comment on the Proposed Rules. The Committee supports FINRA's efforts to create a rule that provides guidance to its member firms with respect to the difficult task of determining the appropriate steps to take in dealing with potentially suspect transaction requests from seniors and vulnerable adults. As indicated below, the Committee has identified a number of concerns related to the Proposed Rules, as well as some requests for additional interpretation and clarification. Given the numerous important issues raised by the Proposed Rules, the Committee recommends that FINRA proceed on moving any such rules forward in an appropriately deliberative manner.

The Committee further notes that the Proposed Rules put members in a very challenging position with respect to their customer relationships. Members will need to collect information from their customer, trusted contact persons, and immediate family members about the capacity of the customer, while at the same time attempting to preserve the trust of, and business relationship with, the customer. In addition, members will need to conduct this internal review without any leverage related to the review other than the good faith of the individuals to whom they direct questions. Any of these interactions required under the Proposed Rules has the capacity to permanently strain, and fundamentally change, the relationship between the firm and the customer.

Issues with Section 22(e) of the Investment Company Act of 1940. The Committee believes that the Proposed Rules permitting a firm to place a temporary hold on the disbursement of funds to a customer for up to 15 business days (and possibly for a successive 15 day period pending the firm's internal review) does not conform with the requirements under Section 22(e) of the Investment Company Act of 1940 ("1940 Act") that are imposed on registered investment companies. Section 22(e) of the 1940 Act states:

> *No registered investment company shall suspend the right of redemption, or postpone the date of payment or satisfaction upon redemption of any redeemable security in accordance with its terms for more than seven days* after the tender of

> such security to the company or its agent designated for that purpose for redemption, except
>
> > (1) for any period (A) during which the New York Stock Exchange is closed other than customary week-end and holiday closings or (B) during which trading on the New York Stock Exchange is restricted;
> >
> > (2) for any period during which an emergency exists as a result of which (A) disposal by the company of securities owned by it is not reasonably practicable or (B) it is not reasonably practicable for such company fairly to determine the value of its net assets; or
> >
> > (3) for such other periods as the Commission may by order permit for the protection of security holders of the company.
>
> The Commission shall by rules and regulations determine the conditions under which (i) trading shall be deemed to be restricted and (ii) an emergency shall be deemed to exist within the meaning of this subsection. (Emphasis added.)

Section 22(e) applies to the disbursement of funds from a variable annuity contract (as well as mutual funds). The Committee notes that the Proposed Rules *could* be read as reconcilable with the 1940 Act requirements to the extent that a disbursement request directed to a broker-dealer does not constitute a disbursement request to an issuer of a variable annuity. Nonetheless, given the important issues raised, the Committee believes that FINRA staff and staff of the Securities and Exchange Commission ("SEC") should work together to provide comprehensive analysis and potential relief so that the Proposed Rules would clearly allow for the same timeframes available to review suspect transactions that involve disbursements of funds from investment company transactions as are available to funds derived from other securities transactions.[3] The Committee notes that an industry-wide no-action letter or an SEC order under Section 22(e)(3) of the 1940 Act may be useful in attempting to resolve these issues.

Status of the Funds Subject to a Temporary Hold. Under the Proposed Rules, firms are permitted to place a temporary hold on the disbursement of funds or securities when they suspect financial exploitation may be present. The Proposed Rules do not provide any significant guidance on the status of those funds during the time of the temporary hold (the "suspense period"). The Committee would ask that FINRA staff be mindful of the fact that many firms may lack the authority to hold customer funds under their respective membership agreements with FINRA and the rules of the Securities Exchange Act of 1934.

We further note that with respect to products like variable annuities, there will be additional complexity added to the manner in which funds should be held during the suspense period. Such complexity results from the presence of several different potential stakeholders,

[3] The Committee notes that similar issues may exist with respect to the delay in disbursing the funds under Rule 15c6-1 under the Securities Exchange Act of 1934.

including: (i) the broker-dealer that serves as the principal underwriter of the variable annuity contract; (ii) the retail selling broker-dealer ("selling firm"); and (3) the insurer issuing the variable annuity. The Proposed Rules fail to clarify the obligations of the different parties that are related to the temporary hold on the disbursements of the funds related to a variable annuity contract withdrawal or surrender, or to address how (and by which entity) such funds should be held when the member is not authorized to hold customer funds.

The Committee believes that additional clear guidance should be provided under the Proposed Rules to clarify:

- Where multiple broker-dealers are involved in the distribution chain, which broker-dealer is responsible for determining that the temporary hold should be placed on the disbursement of funds? The Committee believes that the selling firm is the more appropriate choice but there is, in any case, a lack of clarity on this issue.
- Where should the funds be held (e.g., with the insurance company, with the selling firm) and how should they be titled, during the suspense period? If they are held in the insurance company's general account, the customer funds would not be insulated from the claims of the insurance company's creditors. If the funds remain in the variable annuity separate account, the customer's funds would appear to be subject to market fluctuations during the period for which the disbursement is suspended.
- If the selling firm is not authorized to hold customer funds, what arrangements must be made for the funds during the suspense period?
- If the investigation shows that the requested transaction was not authorized by the customer and should not have taken place, how will the funds be restored to the customer account? Will the customer be credited with gains or charged with losses that occurred during the suspense period?

Compliance with Regulation S-P. Under the Proposed Rules, when a firm reasonably believes that financial exploitation may or does exist, the firm is authorized to contact the trusted contact person "and disclose information about the customer's account to confirm the specifics of the customer's current contact information, health status, and the identity of any legal guardian, executor, trustee or holder of a power of attorney."[4] In addition, if the firm places a hold on the disbursement of funds, the firm is required to notify the following parties of the temporary hold placed on the funds:

- all parties authorized to transact business on the account; and
- the Trusted Contact Person unless the Trusted Contact Person is unavailable or the member reasonably believes that the Trusted Contact Person has engaged, is engaged, or will engage in the financial exploitation of the Specified Adult, in which case the member shall attempt to contact an immediate family member of the Specified Adult, if available, unless the member reasonably believes that the immediate family

[4] SM.06.

> member has engaged, is engaged, or will engage in the financial exploitation of the Specified Adult.[5]

The Proposed Rules therefore expressly contemplate that information about the account owner that is "nonpublic personal information" ("NPI") protected under Regulation S-P could be shared with the trusted contact person, and in some cases, an immediate family member. RN 15-37 briefly addresses the privacy issues created by the Proposed Rules in Endnote 7 by stating that:

> FINRA notes that Regulation S-P excepts from the Regulation's notice and opt-out requirements disclosures made: (A) to comply with federal, state, or local laws, rules and other applicable legal requirements; or (B) made with client consent, provided such consent has not been revoked. . . . FINRA believes that disclosures to a trusted contact person pursuant to proposed Rules 2165 or 4512 or with unrevoked customer consent would be consistent with Regulation S-P.

The Committee believes that additional consideration should be given to several aspects of the privacy analysis related to the Proposed Rules.

1. Given that "immediate family members" may be provided information in some circumstances under Rule 2165, the disclosure required under SM.06 may need to be revised to acknowledge the possibility that contacting an immediate family member may occur if the trusted contact person cannot be reached.

2. While the Notice suggests that compliance with Regulation S-P can be achieved through an unrevoked client consent, the Proposed Rules do not even require *consent* from the customer to disclose NPI. The proposal is instead to require simply a *disclosure* to the customer under SM.06 that NPI might be disclosed.

3. A narrow reading of the Regulation S-P exception for compliance with law may not clearly provide sufficient coverage with respect to the disclosure of the NPI. Under 17 CFR §248.15(a)(7)(i), the restrictions under Regulation S-P "do not apply when you disclose nonpublic personal information . . . *to comply with* federal, State, or local laws, rules and other applicable legal requirements." While the Committee believes that disclosures called for under the Proposed Rules would be "*in compliance with*" applicable laws, it is not completely clear that the disclosures are being made "*to comply with*" applicable laws. Given that the Proposed Rules provide firms with permission, but do not require them, to place a temporary hold on the disbursement of funds (and thus disclose NPI), it is possible that the language of the Regulation S-P exception for compliance with law may not necessarily be viewed as applicable by the SEC, a court, or a customer.

In order to avoid potential conflicts and confusion, the Committee requests that FINRA provide firms with a more definitive analysis of whether disclosures made to a trusted contact

[5] Rule 2165(b).

person or immediate family member under the Proposed Rules create any issues for firms under Regulation S-P.

The Information Exchange with the Trusted Contact Person Should Allow for a Broader Dialogue. Under SM.06, the firm is authorized to contact the trusted contact person and disclose account information in order to confirm: (1) the customer's current account information; (2) the customer's health status; and (3) the identity of any legal guardian, executor, trustee, or holder of a power of attorney. The Committee believes that the Proposed Rules should include a provision that anticipates that a broader conversation might occur between the firm and the trusted contact person. Given the potentially complex nature of financial exploitation cases, and the many different types of relationships that might exist between the Specified Adult and the trusted contact person, the Committee believes that the interaction between the firm and the trusted contact person could take a variety of forms. The Committee believes that the Proposed Rules should be revised to allow a more general "catch all" category of information that may be disclosed to the trusted contact person.

The Definition of "Specified Adult." A Specified Adult is defined under Rule 2165 as: (a) a natural person age 65 and older (referred to below as "seniors"); 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 (referred to below as "vulnerable adults"). The Committee believes that FINRA should work with any and all applicable state securities regulatory authorities in an effort to ensure that firms are only subject to one "age" requirement for rules related to placing a hold on funds for seniors. The Committee notes that the current proposed model rule from the North American Securities Administrators Association on seniors and vulnerable adults uses 60 as the triggering age for protection under their proposed rules.

The Committee also believes that implementing the Proposed Rules with respect to vulnerable adults potentially creates significant and additional challenges. For example, it is likely that individuals may transition into and out of the categorization of vulnerable adult over time. The Proposed Rules would impose on firms a continuing duty to determine whether or not such account owners should remain or become subject to the Proposed Rules. For example, a customer classified as a vulnerable adult at the outset of the account relationship may improve to the point where classification as a vulnerable adult may no longer be appropriate. In any case, it seems clear that the administration of the vulnerable adults provisions under the Proposed Rules would be much more difficult than administering the rules for senior investors. The Committee also is concerned that firms may be subject to spurious claims that they are using classification of customers as vulnerable adults as a pretext to routinely delay disbursement. For these reasons, the Committee recommends that FINRA omit references to vulnerable adults from the definition of "specified adult."

The Trusted Contact Person Information Should Only Be Collected for Account Owners Who Are Over 55. The Committee believes that identifying a trusted contact person for customers may prove beneficial to the protection of seniors and eliminating financial exploitation. From a practical perspective, however, the Committee believes that requiring the

collection of that information from every account owner may create unwarranted administrative burdens that outweigh the benefits. For example, the Committee wonders what the likelihood is that a client in their 30s or 40s will remain a firm client at the age of 65? The Committee believes that the Proposed Rules should focus on those investors who will require the protections of the rules in the short or medium term, and not in the long term, and recommends that Rule 4512 be revised to require that information on a trusted contact person only be collected for account owners who are 55 or over.

Timing Issues Created Under the Proposed Rules. The Proposed Rules impose a number of different timing obligations on firms. We note that firms: (1) must initiate an internal review of the suspected financial exploitation *immediately*; (2) can suspend the disbursement of funds for *15 business days* (followed by another 15 days depending on the results of the internal review); and (3) must notify the trusted contact person and the account owners of the determination to hold the disbursement within *2 business days*.

The Proposed Rules would benefit from additional detail indicating when that period begins and when it terminates. For example, if a member firm decides to place a temporary hold on Monday, May 3rd, at 2:15 p.m., does the firm have until 2:15 p.m. on May 5th to make the required notifications, or until the close of business on May 5th? What form of notice would be deemed to meet the requirements of Rule 2165? Would leaving a voice message be acceptable? Sending an email? If the notification takes place by regular U.S. mail, what is deemed within the 2 business days time period - placing the notification into the outgoing mail or delivery of the notification within the required number of business days? The Committee requests clarification so that member firms can be confident that they are designing their notification procedures in a manner that complies with the deadlines.

Internal Review. The Committee believes that requiring the internal review to begin "immediately" may prove to be an unnecessarily strict standard. Under a literal reading, the Qualified Person may be required to begin the review the moment after deciding to place a temporary hold on the funds. Given practical considerations and the extensive demands on firm personnel's time, the Committee believes a more appropriate standard would be to begin the internal review "as soon as reasonably practicable" following the determination to place a temporary hold on the funds.

Expiration of the Temporary Hold in 15 Business Days. Given the likely difficulty in investigating alleged financial exploitation and discussing the situation with the relevant parties (e.g., the trusted contact person, registered representative(s) assigned to the account and their supervisors) and assessing the potential financial exploitation, the Committee believes that it may prove impractical for firms to conduct a comprehensive review and reach a well-reasoned conclusion within 15 business days. The Committee recommends that Rule 2165 be revised to provide for an initial period of 25 business days to conduct the internal review, followed by the possibility of granting an additional 10 business days, depending on the results of the review. The change in this manner only extends the total number of days by 5 but addresses the difficulty that firms might face in making quick progress on the review at the outset.

Notification of the Account Owners and Trusted Contact Persons in 2 Business Days. The Committee believes that in many circumstances it will be difficult for the firm to make all of the required notifications in 2 business days. For example, a situation involving multiple account owners may quickly grow complicated and make it difficult to contact all relevant parties on a timely basis.[6] In addition, if a firm determines to notify immediate family members due to concerns about the trusted contact person, that process and notification is bound to require additional time. The Committee recommends that the notification period be extended to 4 business days.

The Substance of the Notice of the Temporary Hold. Rule 2165(b)(1)(B) requires that firms provide notification about the hold to all persons authorized to transact business on the account and the trusted contact person and "the reason for the temporary hold." The Committee believes that Rule 2165 should be drafted in a manner that lets firms determine how much information, if any, to provide as to the reasons for the hold. In some situations, firms may determine that providing explicit information about concerns of financial exploitation may be appropriate. In other situations, a firm may determine that the less information that is provided the more likely the firm would be to resolve the situation. The Committee also believes that firms may be at risk for baseless complaints or claims of defamation to the extent they are required to indicate that the hold is in place due to concerns about financial exploitation.

Proposed Expansion of the Safe Harbor Under the Proposed Rules. SM.01 of Rule 2165 proposes a "safe harbor" with respect to the determination to place funds on hold. The Committee notes that there is no express reference in the Proposed Rules, the Supplementary Material, or RN 15-37 to the anticipated impact for an account that is: (1) not subject to the obligation under the Proposed Rules to collect information on a trusted contact person and disclose the potential use of that information to the customer because it was opened prior to the effective date and no trusted contact person information was collected; or (2) opened after the effective date of the Proposed Rules but for which the firm was not able to collect information on a trusted contact person. The Committee recommends that SM.01 be revised and expanded to explicitly indicate that the safe harbor will extend to firms under each of the situations indicated above.

The Committee also notes that SM.01 declares the "safe harbor," but does not expressly indicate from what claims the FINRA safe harbor provides protection. If FINRA's intention is to provide a safe harbor from regulatory actions against firms and their associated persons, SM.01 should state that more explicitly.

Clarify "Reasonable Efforts" to Identify a Trusted Contact Person. The Committee requests clarification regarding what activities constitute "reasonable efforts" when a member firm is trying to obtain the identity of the trusted contact person. For new accounts, would including a request to name a trusted contact person in the new account documents constitute "reasonable efforts?" For currently existing account owners, would including a disclosure or

[6] The Committee believes that FINRA should consider whether Rule 2165(b)(1)(B)(i) should also allow firms to determine to refrain from notifying a party authorized to transact business on the account about the temporary hold if they are suspected of being involved in the financial exploitation.

questionnaire in account update requests that are mailed out to clients at least once every three years meet the "reasonable efforts" standard? This clarification would allow member firms to operationalize the standard required under the Proposed Rules.

The Proposed Rules Do Not Provide a Solution for Firms if Financial Exploitation Exists. The Committee is concerned that the Proposed Rules do not provide clear instruction to firms in the situation where those engaging in financial exploitation simply wait out the temporary hold. If the firm conducts its internal review and determines that financial exploitation is occurring, and then determines as a result to hold the funds for an additional 15 days, it has no authority at the end of the second 15 day period to continue the hold, nor do the Proposed Rules suggest steps the firm should take if it reasonably believes that financial exploitation exists. The Committee believes that FINRA, in addition to providing guidance on funds handling as discussed above, needs to provide a more definitive mechanism under which the firms may refer the financial exploitation issue to the proper agency or other governmental body for handling.

Implementation Period Prior To Compliance Date. The Proposed Rules create a number of operational and other challenges as described in more detail above. The Committee feels strongly that the Proposed Rules, once finalized, should have at least a one-year period to allow firms to coordinate with their distribution and issuing partners, implement the use of the new forms and systems that must be developed to collect the information on the trusted contact person, and develop and roll-out the new procedures, recordkeeping and training requirements under the Proposed Rules.

CONCLUSION

The Committee appreciates the opportunity to comment on the Proposed Rules. The Committee would be pleased to meet with FINRA staff to discuss the comments in this letter and provide additional feedback to FINRA on the implications of moving forward with the Proposed Rules. Please do not hesitate to contact Eric Arnold (202.383.0741), Cliff Kirsch (212.389.5052) or Mary Jane Wilson-Bilik (202.383.0660) if you have any questions regarding this letter.

Respectfully submitted,

SUTHERLAND ASBILL & BRENNAN LLP

BY: _____
Eric Arnold

BY: _____ EAA
Cliff Kirsch

BY: _____ EAA
Mary Jane Wilson-Bilik

FOR THE COMMITTEE OF ANNUITY INSURERS

Appendix A

THE COMMITTEE OF ANNUITY INSURERS

AIG Life & Retirement
Allianz Life
Allstate Financial
Ameriprise Financial
Athene USA
AXA Equitable Life Insurance Company
Fidelity Investments Life Insurance Company
Genworth Financial
Global Atlantic Life and Annuity Companies
Great American Life Insurance Co.
Guardian Insurance & Annuity Co., Inc.
Jackson National Life Insurance Company
John Hancock Life Insurance Company
Life Insurance Company of the Southwest
Lincoln Financial Group
MassMutual Financial Group
Metropolitan Life Insurance Company
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
Symetra Financial Corporation
The Transamerica companies
TIAA-CREF
USAA Life Insurance Company
Voya Financial, Inc.