

November 28, 2016

VIA ELECTRONIC MAIL

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

**Re: File Number SR-FINRA-2016-039
SEC Notice of Filing of FINRA Proposed Rule Change to Amend FINRA
Rule 4512 (Customer Account Information) and Adopt FINRA Rule 2165
(Financial Exploitation of Specified Adults)**

Dear Mr. Fields:

We are submitting this letter on behalf of our client, the Committee of Annuity Insurers (the "Committee"),¹ in response to the Notice of Filing SR-FINRA-2016-039 (the "Notice"), which was published in the Federal Register on November 7, 2016 by the Securities and Exchange Commission ("SEC").² The Notice requests comment on a proposal by the Financial Industry Regulatory Authority, Inc. ("FINRA") to amend FINRA Rule 4512 (Customer Account Information) and adopt new FINRA Rule 2165 (Financial Exploitation of Specified Adults) (collectively referred to as the "Proposed Rules") in the Consolidated FINRA Rulebook.

The Proposed Rules would require firms to make a reasonable effort to obtain the name and contact information of a "trusted contact person" for any non-institutional account. In addition, the Proposed Rules 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

¹ The Committee was formed in 1981 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 over 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 National Association of Insurance Commissioners (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 81 Fed. Reg. 78,238 (Nov. 7, 2016), which is available at <https://www.gpo.gov/fdsys/pkg/FR-2016-11-07/pdf/2016-26797.pdf>.

adults” where there is a reasonable belief of “financial exploitation” of those adults. FINRA has indicated that the Proposed Rules would explicitly permit firms to reach out to a trusted contact person or put a temporary hold on the disbursement of funds under certain circumstances to protect seniors and other vulnerable adults from financial exploitation.

BACKGROUND ON THE PROPOSED RULES

The Committee has been active in reviewing and commenting on the rules proposed by FINRA related to financial exploitation of seniors and other vulnerable adults from the outset of FINRA’s efforts. A rule proposal related to financial exploitation of seniors and other vulnerable adults was first circulated by FINRA in 2015 under Regulatory Notice 15-37, *Financial Exploitation of Seniors and Other Vulnerable Adults: FINRA Requests Comment on Rules Relating to Financial Exploitation of Seniors and Other Vulnerable Adults* (Oct. 2015) (“RN 15-37”).³ The Committee submitted a comment letter on that initial proposal on November 30, 2015 (the “Comment Letter”).⁴

After reviewing the comments submitted by the Committee, as well as other commenters, FINRA filed the Proposed Rules for approval by the SEC on October 19, 2016. The Proposed Rules reflect FINRA’s response to the comments it received under Regulatory Notice 15-37, including many of the comments raised by the Committee’s Comment Letter. The Committee commends FINRA for its efforts to revise the Proposed Rules over the course of the rulemaking history. The Committee appreciates the opportunity to comment on the revisions to the Proposed Rules and also on FINRA’s responses to certain previous comments made by the Committee. However, with respect to certain of these responses, the Committee seeks further clarification, as described more fully in the comments set forth below.

COMMITTEE COMMENTS

The Committee believes it is worthwhile to continue to focus its attention on several aspects of the Proposed Rules that create a potential lack of clarity, undue compliance burdens and potentially increased exposure to private actions against member firms. In addition, the Committee provides comments on the possible incompatibility of the Proposed Rules with federal securities laws and regulations, as well as state laws.

Interpretation of Section 22(e) of the Investment Company Act of 1940. Section 22(e) of the Investment Company Act of 1940 (the “1940 Act”) imposes a comprehensive framework with respect to redemptions of mutual fund shares and variable annuities. Under Section 22(e) and the rules thereunder, redemption requests received in good order are required

³ RN 15-37 is available at http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-15-37.pdf.

⁴ The Committee’s comment letter on Regulatory Notice 15-37 is available here: http://www.finra.org/sites/default/files/15-37_Sutherland_comment.pdf.

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to be redeemed in accordance with specific timing requirements. It is critical that the Proposed Rules work in tandem with the applicable 1940 Act requirements. Along these lines, we would ask that FINRA indicate whether it has received confirmation from the SEC staff regarding certain interpretative issues with respect to Section 22(e) which were raised by the Committee in our previous comment letter. If FINRA has not yet received confirmation, we would request that any rule filing not advance until the SEC staff acknowledges it has conferred with FINRA regarding these issues, and agrees with FINRA's position.

By way of background, the Proposed Rules allow for a broker-dealer to place a temporary hold on the disbursement of funds to a customer for up to 15 business days (and possibly for a successive 10 business day period pending the firm's internal review). The Comment Letter noted that the authority to place a temporary hold on disbursements may not comply with the requirements of Section 22(e) of the 1940 Act that are imposed on registered investment companies. More specifically, 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.)

The Notice responded to this concern by noting that FINRA did not anticipate any conflict with Section 22(e) of the 1940 Act because the Proposed Rules only apply to "disbursements" from customer accounts, and registered investment companies do not have a role in the disbursement of funds from a customer's account held by a broker-dealer intermediary, but rather serve a role with respect to transactions or redemptions, which FINRA

notes are not covered by the Proposed Rules. The Notice also stated, however, that there may be a conflict with Section 22(e) of the 1940 Act for customer accounts that are maintained by a mutual fund's principal underwriter.⁵

As noted above, the Committee believes that the Proposed Rules should not advance until FINRA indicates that it has coordinated with the SEC regarding its interpretation of compliance with Section 22(e) of the 1940 Act, which is administered and enforced by the SEC. Although FINRA may not see a conflict between the Proposed Rules and Section 22(e), the SEC may interpret the broker-dealer's disbursement hold as indirectly preventing a mutual fund from processing a redemption request in violation of Section 22(e).

In addition, the Committee requests that FINRA clarify how member firms should place a temporary hold in connection with new FINRA Rule 2165 where the customer's account is maintained by a mutual fund's or variable annuity's principal underwriter. As FINRA acknowledged in the Notice, accounts maintained by a mutual fund's principal underwriter may present a conflict with Section 22(e) of the 1940 Act. Nonetheless, the Notice does not present any solution or means of handling this conflict. Committee members are concerned that the issues raised for mutual fund disbursements apply equally in the context of a variable annuity contract where the customer's account relationship is with the broker-dealer who also serves as the principal underwriter of the variable annuity. The Committee would appreciate FINRA providing some guidance as to how a firm would reconcile the competing interests of determining to impose a hold under FINRA Rule 2165 with the obligations that the firm owes to assist the separate account of the issuing insurance company, in its capacity as a registrant under the 1940 Act, to satisfy its Section 22(e) obligations. As we indicated in the Comment Letter, it may be appropriate for FINRA to explore with (or request from) the SEC the possibility of receiving an order under Section 22(e) (3) that would treat the hold of the disbursement of funds in reliance on FINRA Rule 2165 as protected from the standard terms of Section 22(e) with respect to the timing of the redemption.

The Notice indicates that FINRA Rule 2165 "does not apply to transactions, including redemptions of securities,"⁶ The Committee reads that provision as indicating that a withdrawal or surrender under a direct held variable annuity contract would not be impacted by the rules and requests clarification on that point.

Interpretation of Regulation S-P. The Proposed Rules 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" to address possible financial exploitation. The Comment Letter identified certain concerns with this disclosure of NPI, particularly since the Proposed Rules do not require consent from the customer to disclose

⁵ 81 Fed. Reg. at 78,248.

⁶ 81 Fed. Reg. at 78,248

NPI, notwithstanding the fact that the disclosure itself may violate a firm's duty to protect customer privacy under Regulation S-P.

The Notice addressed the Committee's concerns by noting that FINRA did not believe a member's disclosure of information pursuant to Rule 2165 would create a conflict with Regulation S-P. More specifically, the Notice pointed out that Regulation S-P contains an exception for disclosures made to "comply with" federal, state, or local laws, rules, and other applicable legal requirements.⁷ However, as stated in the Comment Letter, it is not completely clear whether disclosures pursuant to Rule 2165 would be made to "comply with" applicable laws, as the Proposed Rules only provide firms with the permission (and not a requirement) to place temporary holds on customer accounts.

Although FINRA may believe that disclosures under the Proposed Rules will fit within the Regulation S-P exception for disclosures to comply with applicable laws, the Committee requests clarification whether the SEC agrees with this assessment.⁸ Regulation S-P is administered and enforced by the SEC, so the Committee would appreciate understanding the extent to which FINRA has been coordinating with the SEC on this interpretation of Regulation S-P, and whether the SEC would adopt a similar interpretation.

Follow-up if Financial Exploitation Exists. As the Committee pointed out in the Comment Letter, someone engaging in financial exploitation of a senior investor could simply wait out the temporary hold period. The Notice clarified that the temporary hold may be terminated or extended by a state regulator, agency, or court of competent jurisdiction. Nonetheless, FINRA did not offer any details in the Notice regarding when, how, or even if firms should notify federal, state, or local regulators when they suspect financial exploitation. Unlike the model rule offered by the North American Securities Administrators Association concerning senior investors, the Proposed Rules do not require reporting to any federal or state securities regulators.⁹ The Committee requests that FINRA explain how regulators would be able to exercise the right to extend a temporary hold without any requirement that member firms notify such regulators of the suspected financial exploitation.

Safe Harbor Protection. Under the Proposed Rules, firms are provided with a limited "safe harbor" when they exercise discretion in placing temporary holds on disbursements of

⁷ 81 Fed. Reg. at 78,256.

⁸ The Committee notes that, in addition to working through the Regulation S-P issues, member firms will need to review state insurance laws, and in some cases the Health Insurance Portability and Accountability Act (HIPAA) provisions to ensure that notifications of the Trusted Contact Person do not conflict with the other privacy provisions that are applicable to variable annuity and variable life insurance contracts.

⁹ NASAA Model Act, "An Act to Protect Vulnerable Adults from Financial Exploitation" is available at <http://serveourseniors.org/wp-content/uploads/2015/11/NASAA-Model-Seniors-Act-adopted-Jan-22-2016.pdf>

funds or securities from a customer's account.¹⁰ This "safe harbor," however, is limited to violations of FINRA Rules 2010, 2150, and 11870, and does not protect firms and their associated persons from private claims. The Committee notes that the NASAA model rule does attempt to grant immunity to firms related to their disbursement hold activities even with respect to private claims.

Given that firms may still be subject to FINRA sanctions (outside of Rule 2010, 2150, and 11870 violations) and private claims, the Committee wishes to emphasize the costs associated with defending against these claims. The Proposed Rules expose firms to a number of potential claims, both from various regulatory agencies and also the plaintiff's bar, for either withholding customer funds pursuant to proposed Rule 2165 when the firm suspects financial exploitation, or *not withholding* customer funds when the firm reasonably should have suspected financial exploitation. While FINRA has indicated that the Proposed Rules' impact on private claims is "ambiguous,"¹¹ it would be helpful to understand whether any quantitative analysis was performed to determine the potential benefit of the Proposed Rules versus the potential increase in claims as a result of claims made that firms made the "wrong" decision under the Proposed Rules.

In addition, the Committee also notes that the risk of being second-guessed under the Proposed Rules may cause firms to exercise extreme caution and place overly "defensive" holds on customer accounts pursuant to proposed Rule 2165 anytime they had reason to suspect even the slightest amount of financial exploitation. These "defensive" holds would be similar to the "defensive" filings that many financial institutions make to avoid violations of federal anti-money laundering requirements (e.g., "defensive" suspicious activity reports). The Committee believes that these "defensive" holds pursuant to proposed Rule 2165 would potentially upset customer relationships and create costly administrative burdens on member firms.

Accordingly, in order to seek to ensure effective administration of the hold process, the Committee requests that Proposed Rules provide firms with a broad safe harbor for firms' reasonable determinations regarding whether or not to place a hold on a disbursement.

Proposed Timing for Notification of Hold. Under proposed Rule 2165(b)(1)(B) the member firm has two business days to provide the notification of the hold to the Trusted Contact Person and all parties authorized to conduct business on the account. The Committee believes for logistical and other reasons, particularly for accounts with a number of authorized parties, the two business day rule will be difficult to meet. The Committee suggests that the rule be revised to provide for four business days to make the required notification.

¹⁰ The Committee further notes that the Proposed Rules do not appear to allow a firm to suspend or place a hold on an instruction to re-allocate funds under a variable annuity contract. The Committee believes that in certain situations such re-allocation instructions could also benefit from the protections of the safe harbor.

¹¹ 81 Fed. Reg. at 78,242.

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CONCLUSION

The Committee appreciates the opportunity to comment on the Notice. Please do not hesitate to contact Eric Arnold ([REDACTED]) or Clifford Kirsch ([REDACTED]) if you have any questions regarding this letter. We note that the Committee would be happy to meet with either FINRA or SEC staff to discuss any of the issues or concerns identified in this letter if you think that would be helpful.

Respectfully submitted,

SUTHERLAND ASBILL & BRENNAN LLP

BY: 
Eric Arnold

BY:  EA
Clifford Kirsch

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
USAA Life Insurance Company
Voya Financial, Inc.