



October 6, 2020

Ms. Vanessa Countryman  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-1090

**Re: File No. SR-FINRA-2020-020 (Proposed Rule Change to Adopt FINRA Rule 3241 (Registered Person Being Named a Customer's Beneficiary or Holding a Position of Trust for a Customer))**

Dear Ms. Countryman:

This letter responds to comments received by the Securities and Exchange Commission ("SEC" or "Commission") to the above-referenced rule filing (the "Proposal") related to adopting FINRA Rule 3241 (the "Proposed Rule") to create a uniform, national standard to limit any associated person of a member firm who is registered with FINRA (each a "registered person") from being named a beneficiary, executor or trustee, or to have a power of attorney or similar position of trust for or on behalf of a customer. The Proposed Rule would protect investors by requiring all member firms to affirmatively address registered persons being named beneficiaries or holding positions of trusts for customers. The Proposed Rule would require the member firm with which the registered person is associated, upon receiving written notice from the registered person, to review and approve the registered person assuming such status or acting in such capacity. The Proposed Rule would not apply where the customer is a member of the registered person's "immediate family."<sup>1</sup>

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<sup>1</sup> The Proposed Rule would define "immediate family" to mean parents, grandparents, mother-in-law or father-in-law, spouse or domestic partner, brother or sister, brother-in-law or sister-in-law, son-in-law or daughter-in-law, children, grandchildren, cousin, aunt or uncle, or niece or nephew, and any other person who resides in the same household as the registered person and the registered person financially supports, directly or indirectly, to a material extent. The term includes step and adoptive relationships. See proposed Rule 3241(c).

The Commission published the Proposal for public comment in the Federal Register on July 9, 2020,<sup>2</sup> and received three comments in response to the Proposal.<sup>3</sup> The following are FINRA's responses, by topic, to the commenters' material concerns.

#### Support for Proposal

PIABA stated that the adoption of the Proposed Rule to create a uniform, national standard to govern registered persons holding positions of trust will better protect investors and provide consistency across member firms' policies and procedures. SIFMA appreciated the importance of the Proposed Rule in promoting trust and confidence in the securities industry and supported FINRA's efforts to protect customers through the implementation of the Proposed Rule. SIFMA further stated that many member firms currently enforce policies limiting a registered person's ability to be named in such capacities and that the Proposed Rule will ensure that all member firms put in place appropriate policies to protect their senior and vulnerable clients.

#### Opposition to the Proposal

NASAA reiterated the comments submitted in response to the Proposed Rule in FINRA Regulatory Notice 19-36 (November 2019). NASAA stated that registered persons should be prohibited from being named as beneficiaries or appointed to positions of trust by any customers other than immediate family members. Even with respect to immediate family members, NASAA stated that registered persons should be required to seek and obtain written authorization from their member firms, who should be responsible for evaluating the arrangements. NASAA suggested establishing a baseline of information that registered persons be required to provide, and more specific guidance on considerations for member firm approval. Additionally, where member firms approve customer beneficiary or trust position arrangements, NASAA stated that the accounts at issue should be subject to

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<sup>2</sup> See Securities Exchange Act Release No. 89218 (July 2, 2020), 85 FR 41249 (July 9, 2020) (Notice of Filing of File No. SR-FINRA-2020-020).

<sup>3</sup> See letter from Christopher Gerold, President, North American Securities Administrators Association, Inc. (NASAA), to J. Matthew DeLesDernier, Assistant Secretary, SEC (July 30, 2020); letter from Samuel B. Edwards, President, Public Investors Advocate Bar Association (PIABA), to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA (July 30, 2020); and letter from Lisa Bleier, Managing Director, Securities Industry and Financial Markets Association (SIFMA), to J. Matthew DeLesDernier, Assistant Secretary, SEC (July 30, 2020).

heightened supervision to ensure that any conditions and limitations are observed faithfully.

As stated in Regulatory Notice 19-36 and the Proposal, FINRA considered an outright prohibition of some or all positions of trust, but decided against that approach as some positions of trust, if properly known to and assessed by member firms, may benefit customers. For example, assuming that the member firm has done a reasonable assessment of the potential conflicts of interest before making a reasonable determination to approve the arrangement, a registered person with financial acumen and knowledge of a customer's financial circumstances may be better positioned to serve in a position of trust than other alternatives available to the customer.

The Proposed Rule applies to customers who are not immediate family members because of the greater potential risk that the registered person has been named a beneficiary or to a position of trust by virtue of the broker-customer relationship. The risk that a registered person misused his or her role in the broker-customer relationship to be named a beneficiary or hold a position of trust is reduced when the customer is an immediate family member.

A member firm has a duty to reasonably assess the risks associated with the proposed status or arrangement (discussed in more detail below) and, depending on the circumstances, supervisory responsibilities. If a member firm imposes conditions or limitations on its approval, the member firm would be required to reasonably supervise the registered person's compliance with the conditions or limitations. Moreover, where a registered person is named a beneficiary, executor, or trustee or holds a power of attorney or a similar position for or on behalf of a customer account at the member firm with which the registered person is associated, the member firm must supervise the account in accordance with FINRA Rule 3110 (Supervision), including the longstanding obligation to follow-up on "red flags" indicating problematic activity. As to this latter point, with the notification and assessment of a registered person being named as a beneficiary or to a position of trust in relation to a customer account at the member firm, there is inherently more information from which red flags may surface. If a registered person is approved to hold (and receive compensation for) a position of trust for a customer away from the member firm, the requirements of both the Proposed Rule and Rule 3270 (Outside Business Activities of Registered Persons) regarding outside business activities would apply to the activities away from the firm.

A member may choose to go beyond the Proposed Rule to: (1) require notification and approval when a registered person is named a beneficiary or named

to a position of trust for immediate family members; (2) further limit or prohibit registered persons from being named a customer's beneficiary or to a position of trust for a customer; or (3) impose additional obligations on the registered person when he or she is named a beneficiary or to a position of trust for a customer.

### Definitions

NASAA appreciated FINRA's decision, in response to comments FINRA received to Regulatory Notice 19-36, to narrow the inclusion of financially supported persons as "immediate family" to those who live in the same household as the registered person.

To address attempted circumvention of the restrictions (e.g., by closing or transferring a customer's account), the Proposed Rule would define "customer" to include any customer that has, or in the previous six months had, a securities account assigned to the registered person at any member firm.<sup>4</sup> NASAA reiterated the comment submitted in response to Regulatory Notice 19-36 that a 12-month look-back provision is more appropriate to prevent circumvention of the restrictions.

As stated in the Proposal, the inclusion of the look-back period is important in addressing potential conflicts of interest and circumvention of the Proposed Rule. FINRA believes the six-month period strikes an appropriate balance between achieving the regulatory objective of addressing circumvention of the Proposed Rule change by transferring the customer account to another registered person and imposing reasonable requirements on member firms in tracking account transfers.

### Pre-Existing Beneficiary Status and Positions of Trust

NASAA stated that the Proposed Rule should apply to current and future customers. As stated in the Proposal, many, but not all, member firms currently have policies and procedures in place to address potential conflicts by prohibiting or imposing limitations on being named as a beneficiary or to a position of trust when there is not a familial relationship. Accordingly, member firms may have approved arrangements under the policies and procedures in place prior to the Proposed Rule becoming effective. SIFMA commented in response to Regulatory Notice 19-36 that while many member firms currently have policies in this area, it would be challenging and time-consuming to conduct a full-scale retroactive review of all accounts across an organization to determine whether the arrangements currently in place are consistent with the proposed requirements. In addition, FINRA recognizes that

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See proposed Supplementary Material .01 to Rule 3241.

customers may have relied on the member firm's approval of arrangements currently in place in drafting estate or other legal documents, handling their assets or performing some duties (e.g., a registered representative may have been named a customer's trustee in reliance on the firm's prior approval). Compounding the challenge for firms, registered persons and customers is that some arrangements may have been approved by the firms and in place for many years.

Recognizing the costs and challenges for firms, registered persons and customers, the Proposed Rule would not apply retroactively. The Proposed Rule would apply if the registered person is named a beneficiary or receives a bequest from a customer's estate after the effective date of the rule.<sup>5</sup> For the non-beneficiary positions, the Proposed Rule would apply to positions that the registered person was named to prior to the rule becoming effective only if the initiation of the broker-customer relationship was after the effective date of the Proposed Rule.

In addition, the Proposed Rule would apply when a registered person associates with a new member firm after the effective date. If a registered person was named as a beneficiary or to a position of trust prior to the registered person's association with the member firm, proposed Supplementary Material .04 would require the registered person, within 30 calendar days of becoming so associated, to provide notice to and receive approval from the member consistent with the rule to maintain the beneficiary status or position of trust. If a registered person was named to a position of trust prior to the Proposed Rule becoming effective, proposed Supplementary Material .04 would apply if the registered person moved to a new member firm after the Proposed Rule became effective.<sup>6</sup>

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<sup>5</sup> For example, a registered representative was named a beneficiary of a customer who is not an immediate family member in 2018, consistent with the firm's procedures, and the customer passes away after the Proposed Rule becomes effective. The registered representative is notified by the executor that he is to receive a bequest of \$5,000 from the customer's estate. Because the bequest would be received after the Proposed Rule is effective, the registered representative would be required to provide written notice to the member firm and the member firm would be required to perform a reasonable assessment and determination of whether to approve or disapprove the registered representative receiving the bequest.

<sup>6</sup> For example, a registered representative was named a trustee by a customer who is not an immediate family member in 2018, consistent with Member Firm A's procedures. Notice to and approval by Member Firm A is not required in order for the registered representative to continue serving as the customer's trustee after the Proposed Rule becomes effective. However, if the registered representative left Member Firm A to become associated with Member Firm B after the Proposed Rule

### Reasonable Assessment and Determination

Upon receipt of the written notice from the registered person, the Proposed Rule would require the member firm to: (1) perform a reasonable assessment of the risks created by the registered person's assuming such status or acting in such capacity, including, but not limited to, an evaluation of whether it will interfere with or otherwise compromise the registered person's responsibilities to the customer; and (2) make a reasonable determination of whether to approve the registered person's assuming such status or acting in such capacity, to approve it subject to specific conditions or limitations, or to disapprove it.<sup>7</sup> Regulatory Notice 19-36 and the Proposal included a non-exhaustive list of factors that FINRA expects that a member firm's reasonable assessment of the risks created by the registered person's assuming such status or acting in such capacity would take into consideration (collectively, the "Reasonable Assessment Factors").

PIABA supported requiring member firms to perform a reasonable assessment of potential risks, but stated that the Proposed Rule should go further and also prescribe a uniform written notice for use by registered persons and member firms. As stated in the Proposal, FINRA proposes to provide member firms with flexibility in what form of written notice is required pursuant to the Proposed Rule and, consequently, no specific form of written notice would be required by the Proposed Rule. A member firm should obtain through the written notice or subsequent communications with the registered person or customer information sufficient upon which to perform the required assessment and make the related determination.

NASAA suggested including additional factors that a member firm should consider as part of its reasonable assessment, as well as specific information that should be documented by the member firm. NASAA also suggested that a reasonable assessment and determination process should include an interview with the customer outside of the presence of the registered person. Where it is not possible to interview the customer, NASAA stated that the member firm should at least be

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became effective, proposed Supplementary Material .04 would apply and the registered representative would need to provide notice to and receive approval from Member Firm B in order to continue serving in the position.

<sup>7</sup> See proposed Rule 3241(b)(1). As stated in the Proposal, in assessing a registered person's request to be named a beneficiary of or receive a bequest from a customer's estate, FINRA would expect approval to be given only when the member firm has made a reasonable determination that the registered person being named a beneficiary or receiving a bequest from a customer does not present a risk of financial exploitation that the Proposed Rule is designed to address.

required to verify that the customer directed the appointment of his or her own volition and did not feel pressure to name the registered person a beneficiary or appoint the registered person to a position of trust.

FINRA believes that NASAA's suggestions are subsumed by the Proposed Rule's requirements and Reasonable Assessment Factors stated in the Proposal. Proposed Supplementary Material .03 to Rule 3241 would require the member firm to retain the written notice and approval for at least three years after the date that the beneficiary status or position of trust has terminated or the bequest received or for at least three years, whichever is earlier, after the registered person's association with the member has terminated. As stated in the Proposal, if possible, as part of the reasonable assessment of the risks, FINRA would expect a member firm to discuss the potential beneficiary status or position of trust with the customer as part of its reasonable determination of whether to approve the registered person assuming the status or acting in the capacity. In addition, the Reasonable Assessment Factors include: (1) any indicia of improper activity or conduct with respect to the customer or the customer's; and (2) any indicia of customer vulnerability or undue influence of the registered person over the customer.

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FINRA believes that the foregoing responds to the material issues raised by the commenters to the Proposal. If you have any questions, please contact me at [REDACTED].

Best regards,

/s/ Jeanette Wingler

Jeanette Wingler  
Associate General Counsel