

THIS HOLIDAY SEASON, REVIEW YOUR SERVICES TO VULNERABLE ADULTS - NOV 2017

Legal Risk Management Tip November 2017

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Introduction

During the Thanksgiving season, many of us spend time reflecting on what we are most thankful for. Immediately, my family, and those closest to me (including my clients), come to mind. As we meditate and think about life's various changes, often we are faced with contemplating the effects and challenges of aging. Certain vulnerabilities can surface, such as diminished capacity and financial exploitation, which require forward thinking and purposeful action.

In the financial industry, navigating the regulatory landscape of how to service vulnerable adults can be daunting. Last May, Jacko Law Group, PC's Legal Risk Management Tip focused on [Regulatory Considerations for Servicing Aging Clients](#). Since that time, several states¹ have actively proposed or adopted senior legislation, which includes provisions regarding self-reporting and training. Moreover, the SEC once again issued on January 12, 2017 the staff's examination priorities,² which amongst other things, included senior investors and retirement investments. Through various recent speeches, this focus is expected to continue into 2018.

FINRA, too, has had increased focus on this area. In April 2015, FINRA established a Securities Helpline for Seniors®. According to FINRA's March 30, 2017 press release, since the Helpline's inception, it has received more than 8,600 calls recovering \$4.3 million in voluntary reimbursements from firms to customers. Due to the volume and nature of such calls, it became evident to the self-regulatory organization that rules designed to protect vulnerable adults were necessary.³

In this month's Risk Management Tip, we will discuss two new FINRA rules that go into effect February 5, 2018, which will directly impact how broker-dealers, and those investment advisers

who transact through broker-dealer custodians, will be impacted. In addition, we will highlight best practices and considerations for servicing vulnerable adults, including what to expect if you self-report a financial exploitation matter to the state.

FINRA's New and Amended Rules

On February 3, 2017, the SEC adopted FINRA Rule 2165 (Financial Exploitation of Specified Adults)⁴ to provide safeguards to FINRA members ("Members") in the event that a FINRA Member suspects financial exploitation of certain specified adults. In addition, FINRA Rule 4512 (Customer Account Information)⁵ was amended to require protocols for making reasonable efforts to obtain the name and contact information of a "trusted contact." The details relating to each of these Rules is outlined below. The purpose of these rule changes is simple: to protect vulnerable adult assets and respond to possible financial exploitation.

Amendments to FINRA Rule 4512: Customer Account Information⁶

Under this amendment, FINRA will now require Member firms (such as broker-dealer custodians) to make reasonable efforts to obtain the name and contact information for a trusted contact person upon the opening of a non-institutional customer account, and whenever updating account information. Procedurally, what this means is that when opening an account, a financial advisor (pursuant to a broker-dealer's written supervisory procedures or vis-à-vis instructions from the broker-dealer custodian) must obtain the name of a trusted contact, who could be contacted by the Member in the event that financial exploitation is suspected. In turn, the Member will disclose in writing to the customer during the account opening process that the Member or an associated person of the Member is authorized to contact the trusted contact and disclose information about the customer's account to:

- Address potential financial exploitation issues;
- Confirm the specifics of the customer's current contact information;
- Obtain health status; and/or
- Acquire the identity of a legal guardian, executor, trustee or power of attorney holder on the account.

Notably, this disclosure will be provided regardless if a trusted contact name is provided or not. In speaking with broker-dealer custodians, some will mandate that financial advisors must provide a trusted contact person no matter what, even if that person happens to be the financial advisor herself. In other instances, pursuant to the Rule, some broker-dealers will permit the account to be opened so long as the financial advisor can prove that reasonable efforts were made to secure this information.

New FINRA Rule 2165: Financial Exploitation of Specified Adults⁷

Pursuant to this new rule, a Member can place a temporary hold on the disbursement of funds or securities of a "specified adult" - particularly over age 65, but also someone over 18 who has a mental or physical impairment that renders the individual unable to protect her own interest - if the Member has a reasonable belief that financial exploitation⁸ has occurred. In the event a hold is placed, the Member must:

- Provide a notification of the hold and the reason for the hold to the trusted contact and customer, no less than two business days after the hold was placed;⁹
- Retain records of the notification;
- Expire the hold within 15 business days¹⁰ after the hold was placed; and
- Adopt written supervisory procedures and a training program relating to the placement of such holds on a customer's disbursement of funds or securities.

NASSA's Continued Efforts to Protect Seniors

On January 22, 2016, the North American Securities Administrators Association ("NASAA") adopted a Model Act¹¹ to protect vulnerable adults from financial exploitation. Since that time, NASAA released a paper titled *Guarding the Guardians: The Red Flags of Financial Guardian Abuse* on October 30, 2017¹² in an effort to highlight financial abuse perpetrated by financial guardians and trusted contacts. The paper highlighted "Red Flags" to look for when identifying abuse by financial guardians including:

- Using guardianship authority to transfer property for the benefit of the guardian;
- Receiving personal payments without legal permission; and,
- Authorizing frequent withdrawals without reasonable explanation, among others.

Financial advisors are encouraged to review this resource for helping to identify what to consider for this specific type of financial exploitation. For more information, visit <http://serveourseniors.org/about/investors/red-flags-guardian-financial-abuse/>.

What to Expect If Required to Make a Report to the State

For those financial advisors who opt to or are required to report suspicions of financial exploitation to the state where the customer is serviced, it is important to know what to expect. Each jurisdiction is different, and has unique requirements. But generally, this is what you should prepare:

- A report, either telephonically or online. If you happen to call directly, initial information will be gathered, with further instructions provided. In some instances, you may be asked to complete a reporting form from the county where the victim is located;
- The victim's contact information;
- Information regarding the suspected abuser and their "role" concerning the victim; (*i.e.*, caregiver, parent, spouse, son/daughter, health care provider or other);

- Information related to the reporting party; and,
- Details regarding the incident, including:
 - The place of the incident (such as home, community care center, etc.);
 - The type of abuse (such as physical, neglect, sexual, abandonment, financial or other);
 - The reporter's observations, including beliefs and statements by the victim;
 - A list of other person(s) believed to have knowledge of the abuse;
 - Any family member(s) or person(s) responsible for the victim's care; and,
 - Whom the incident was reported to (*i.e.*, Adult Protective Services, law enforcement, hospital, etc.).

Once this information is submitted, a social worker will be assigned to determine the type and scope of the abuse, and thereafter, will schedule an interview of the victim by a designated social worker. At the end of the interview, the social worker will provide the victim with a list of available services, should help be necessary.

Conclusion

Regulations in this area are only expected to heighten as our senior population continues to grow and the number of aging clients and vulnerable adults continues to increase. While horrifying and insidious, financial abuse of vulnerable adults with mental and physical impairments can be mitigated and prevented through proactive measures taken by financial advisors. In looking ahead, it is imperative to review your internal controls in this area and to take the time to understand regulatory and state requirements and responsibilities related to the protection of seniors and other vulnerable adults.

For more information on these and other considerations relating to obligations, policies and procedures for the protection of vulnerable adults, please contact us at info@jackolg.com, or (619) 298-2880.

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¹ Currently, senior legislation has gone into effect in Alabama, Arkansas, Colorado, Delaware, Indiana, Louisiana, Maryland, Mississippi, Missouri, Montana, North Dakota, Tennessee, Texas and Vermont. Mandatory training is required in New Mexico and Washington, and Legislation has been approved in Oregon. For more information, visit <http://serveourseniors.org/>.

²For additional information relating to the SEC's 2017 examination priorities, see <https://www.sec.gov/news/pressrelease/2017-7.html>.

³See FINRA News Release, "FINRA Receives SEC Approval on Rule Proposal Addressing Financial Exploitation of Seniors" (Mar. 30, 2017) available at <http://www.finra.org/newsroom/2017/finra-receives-sec-approval-rule-proposal-addressing-financial-exploitation-seniors>.

⁴FINRA Regulatory Notice 17-11 (Mar. 2017) available at <http://www.finra.org/sites/default/files/Regulatory-Notice-17-11.pdf>, p. 1.

⁵*Id.*

⁶*Id.* at p. 12-13.

⁷*Id.* at p. 9-11.

⁸Financial exploitation includes: unauthorized taking, withholding, appropriation or use of a specified adult's funds or securities, or an act of deception, intimidation or undue influence over money.

⁹An exception to this exists if the suspect in question is the trusted contact, in which case notice need not be provided to said trusted contact.

¹⁰An exception to this exists if, as a result of a court order or internal review, the Member's suspicions were supported, in which case an additional 10 business day hold may be added by the Member to help protect the customer.

¹¹For additional information, visit <http://www.nasaa.org/38777/nasaa-members-adopt-model-act-to-protect-seniors-and-vulnerable-adults/>.

¹²"Guardian financial abuse 'red flags' highlighted by NASAA," *IA Watch* (Nov. 13, 2017) at p. 3, 5.