The Ever-Changing Landscape of Elder Financial Abuse Regulations

By Scott N. Sherman and Joshua Lewin

Have you ever won the lottery in Lithuania? Or maybe, you’ve discovered that you own oil rights in Chile? What about a zero percent interest, no strings attached, line of credit on your home? No? It might sound far-fetched to the financial professional but to the lay person, these too-good-to-be-true offers don’t always raise a red flag. In fact, the chances are high that someone you know, 65 years of age or older, might come across one of these offers daily. Elder financial abuse schemes aren’t always this obvious to identify. Yet, no matter the scam, the goal remains the same and the fallout can be ruinous and life-changing for the elder involved.

An estimated one million individuals aged above 65, lose a collective $3 billion a year due to financial elder abuse.\(^1\)

The problem is evident, the solution is unknown, and the regulation is often insufficient, scattered, and always evolving.

To combat elder financial abuse, FINRA implemented an amendment to Rule 4512 Customer Account Information and created a new rule altogether, FINRA Rule 2165 Financial Exploitation of Specified Adults. These changes went into effect on February 5, 2018. In addition to these rules, state legislatures may impose obligations on broker-dealers to report elder abuse and protect elderly clients. With this interwoven regulatory and legal framework in mind, this article aims to inform broker-dealers about the scope of their required compliance with FINRA rules and state law.

FINRA Rule 4512

The amendment to Rule 4512 Customer Account Information imposes an affirmative obligation on broker-dealers to make reasonable efforts to obtain the name and contact information for a “trusted contact person” upon the opening of a customer’s account or when updating accounts already in existence before the amendment.

This requirement applies to all non-institutional account holders, not only to the elderly. A trusted contact person must be age 18 or older and shall be able to be contacted about the customer’s account.

The purpose of the trusted contact person is to allow a member to contact this person and “disclose information about the customer’s account to address possible financial exploitation, to confirm the specifics of the customer’s current contact information, health status, or the identity of any legal guardian, executor, trustee or holder of a power of attorney, or as otherwise permitted by Rule 2165.” (.06 Trusted Contact Person).

This amendment requires only that the member make “reasonable efforts” to obtain this information and the failure to obtain the information will not prevent the member from maintaining an account for that client.

A member is required to disclose in writing the reasons for which a trusted contact person may be contacted. To comply with this amendment, members should make a well-documented attempt to gather this information from their customers in writing. As a recommendation of best practice, members should modify their account opening documents to include this information to ensure full compliance with the rule.

FINRA Rule 2165

New Rule 2165 Financial Exploitation of Specified Adults does not impose a mandatory obligation on members to protect their elderly clients. Instead, the rule permits, but does not require, a member who reasonably believes that financial exploitation of “Specified Adult[s] has occurred, is occurring, has been attempted, or will be attempted” to

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place a temporary hold on a disbursement of funds or securities from that individual’s account.

A “Specified Adult” is defined as “(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.”

For members that choose to protect their elderly clients from financial exploitation, FINRA Rule 2165 provides a vehicle for this much needed help. Previously, placing a hold on client accounts may have violated other FINRA rules. Now, when members reasonably believe that a Specified Adult is a victim of financial exploitation, the member can follow the procedure more specifically outlined in FINRA Rule 2165 and take steps to protect that client’s disbursements.

Pursuant to the rule, financial exploitation means:

“(A) the wrongful or unauthorized taking, withholding, appropriation, or use of a Specified Adult’s funds or securities; or

(B) any act or omission 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.”

To determine if financial exploitation is occurring, the member should contact the Trusted Contact Person created by FINRA Rule 4152. The member may also undertake its own investigation regarding the facts and circumstances surrounding the requested disbursement. The rule effectively provides a safe harbor for members in placing a hold on temporary accounts. In other words, a member does not need to be correct about the existence of financial exploitation.

FINRA Rule 2165 aims to allow members to comply with state law requirements without fear of simultaneously violating a FINRA rule in contravention.

State Law Requirements

Unfortunately, states lack uniformity when it comes to elder financial law and the obligations of broker-dealers (and others) to provide certain protections to this group of vulnerable individuals. Further complicating the matter for broker-dealers is the fact that states are not exactly clear, or upfront, about what these obligations may be. As a result of these issues, broker-dealers are often in the dark.

As a starting point, broker-dealers are charged with knowing the law in every state in which they operate — here, that means members are required to familiarize themselves with the laws of each state where the client resides.

The key to compliance is to have a reference point for the applicable law. In this respect, having resources is critical. The United States Department of Justice provides a reference to all state laws relevant to issues of elder abuse. This reference can be found here: [www.justice.gov/elderjustice/prosecutors/statutes](http://www.justice.gov/elderjustice/prosecutors/statutes). In addition to this reference, National Adult Protective Services Association published a 50-state survey, last updated in 2015, concerning financial institutions’ reporting requirements for elder abuse that can be found in the footnote here. Finally, each state’s department of Adult Protective Services or similar department should be willing and able to provide guidance.

At present, every state has elder abuse laws, but they are all different, and many states have more than just one law. One of the most pressing and obvious issues is whether broker-dealers are merely permitted or recommended to report elder abuse or are actually required to do so. According to the 2013 Nationwide Survey of Mandatory Reporting Requirements for Elderly and/or Vulnerable Persons, updated in 2015, while all states have laws that protect against elder abuse, only 25 states and the District of Columbia require financial institutions to report to Adult Protective Services. Of course, laws can change — and they do. For example, in 2016, Indiana and Vermont

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3. Id.
enacted new laws requiring mandatory reporting of elder financial abuse. This is an ever-expanding field and it is critical to consistently review state law requirements.

Some best practices identified by the SEC Office of Compliance and Examinations, et. al. for broker-dealers to prevent elder abuse and quickly identify financial exploitation are:

a. Increase training under FINRA Rule 1250(b) with emphasis on age and suitability;
b. Establish written internal protocols for handling of suspected elder abuse;
c. Ensure the accuracy of the customer’s information;
d. Assign investment objectives to each product the firm sells;
e. Review marketing materials and eliminate financial jargon; and
f. Review policies and procedures to eliminate “predatory sales techniques.”

While these practices are not exhaustive, they are a good starting point for members to prepare to deal with the many challenges presented by servicing and protecting older clients. In addition to these best practices, when a member suspects potential elder abuse, it is critical to check state law requirements and make the determination of whether to contact Adult Protective Services and report the issue. Members can use the amendment to Rule 4512 and the new Rule 2165 as tools to achieve this desired compliance.

The issues broker-dealers face in regard to protecting their elderly customers, complying with FINRA regulations, and adhering to state laws are ever-changing and never-simple. In light of the new FINRA rules, members should evaluate their policies and procedures, ensure their personnel are aware of these new challenges, and work toward implementation of a business model that accomplishes all of these important goals.

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