Mack Investment Securities, Inc.

Since 1986

January 9, 2020

Re: FINRA Regulatory Notice, 19-36

We are in generally in favor of the proposed rule to have member firms employ heightened scrutiny in assessing, and potentially limiting, an associated 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.

However, we would also consider the addition of a custody rule to allow for forced supervision in situations above a specified ceiling that is adjusted periodically for the time an advisor is in a fiduciary role (disability of customer).

The issue is clear. An unscrupulous, conniving advisor/broker or associated person. And, what better position to acquire access to a client's estate than gaining trust by demonstrating an expertise of handling money - and skilled in relationship psychology.

Is this the job of FINRA? To a limited extent, yes. FINRA members are a first line of defense in this situation for our customers. This obvious customer/advisor conflict of interest needs to be addressed and mitigated, if necessary, by a common-sense supervisory structure.

Certainly, those advisors who look to gain a customer's trust with a final goal of rerouting funds to their personal account, are an issue that is already recognized. Capturing these vulnerable situations is the intent of this rule.

However, FINRA should offer specific guidance if this rule is implemented. Without guidance, an overzealous supervisor or supervisory system could restrict client access to an advisor as their fiduciary and, potentially, cause harm to the customer.

1) **Power of Attorney.** Broker/advisor talks a client into granting power of attorney to him/her/they as opposed to the client's family. This is a concern that a client, and their family, likely already expect is being addressed. Without a supervisory structure and review, and with enough money at stake, the situation could lead to a family's financial loss and potential litigation.
    a. An advisor/broker or associated person becoming a trustee or power of attorney carries a significant risk for a client. This is already addressed by the SEC with investment advisors as a custody issue. And custody, under SEC investment advisor regulations, demands surprise audits to review balances, transactions and fiduciary responsibilities (specific exceptions exist in this rule).

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We would suggest adding a similar surprise audit requirement to this rule during the time a fiduciary relationship exists unless an estate size falls below a specified dollar amount (cost of the audit could be prohibitive for the benefit of the client).[1]
We would carry this rule forward for executors and trustee relationships, after a customer's demise, with the similar rule (with exceptions), as well.

2) **Beneficiary designation.** Supervisory review of a beneficiary designation, in our opinion, is sufficient to address these situations. Specific FINRA guidance should be considered to assist supervisory review.
An example: a client with no living heirs may choose to select their advisor/broker as a beneficiary due to a history of care and concern. The rule should allow supervisory discretion to grant this result. For more debatable situations, a supervisor could be held liable for allowing a questionable beneficiary designation without a full review and explanation.

We can see many different potential situations that may present themselves leading one to say this should be a case-by-case process.

Summary:
Positions of trust. We believe the addition of a custody rule should be considered for positions of trust during the fiduciary period similar to the already existing SEC custody rule.
Beneficiary designations. Beneficiary designations should be decided on a case-by-case basis, as this rule suggests, with specific guidance for supervisory control.

Respectfully,

Stephen W. Mack, CFP
President

[1] https://www.sec.gov/rules/final/2009/ia-2968.pdf