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Invested in America

February 9, 2017

Sen. Sara Gelser, Chair
Sen. Alan Olsen, Vice Chair
Senate Committee on Human Services
Oregon State Legislature
900 Court Street NE
Salem, OR 97301

RE: SB 95

Dear Senators Gelser and Olsen, and Members of the Committee on Human Services:

On behalf of the Securities Industry and Financial Markets Association (SIFMA),[1] I would first like to thank you for the opportunity to provide comments on SB 95, which would establish a process whereby securities firms could take additional measures to protect their senior or vulnerable clients. SIFMA has been a strong supporter of state and federal laws to provide additional tools and pathways to partner with regulators in order to help us further protect our senior clients, while fully complying with existing securities laws and rules. While we support the goal of this bill, we ask for consideration of some specific drafting changes to ensure that our firms will not have a conflict between federal laws and rules and Oregon state law.

SIFMA has been a vocal advocate in the fight against senior financial exploitation for nearly a decade, founded a Senior Investor Protection working group of financial firms that now includes 150 representatives from 50+ diverse member firms, and has worked with multiple states[2] to enact laws which create a reporting pathway from Broker-Dealers to state securities regulators and Adult Protective Services organizations (APS), and permit those reporting firms to place temporary holds on suspicious transactions and/or disbursements to allow time for the state to investigate (commonly referred to as "Report & Hold" laws). We've also submitted comments to both the Financial Industry Regulatory Authority (FINRA) and North American Securities Administrators Association (NASAA) on their respective "Report & Hold" proposals, which seek similar goals but may, in certain instances, have presented operational challenges - especially where the new federal rules[3] and the older state model law conflict.

While SIFMA and its member firms have been working in this space for nearly a decade, over the last few years – in fact over the last year alone – the senior investor protection landscape has quickly evolved. New federal rules were approved this month by the SEC which govern actions by securities firms and provide firms with the ability to take additional actions to protect their senior clients. Incorporating lessons learned from states which have worked to enact laws – from Washington State's 2010 law to present efforts – and the perspectives and expertise from the

[1] SIFMA is the voice of the U.S. securities industry, representing the broker-dealers, banks and asset managers whose 889,000 employees provide access to the capital markets, raising over $2.4 trillion for businesses and municipalities in the U.S., serving retail clients with over $16 trillion in assets and managing more than $62 trillion in assets for individual and institutional clients including mutual funds and retirement plans. For more information, visit http://www.sifma.org.

[2] Washington State, Delaware, Missouri, Indiana, Alabama and Louisiana.

[3] Approved by the SEC February 3, 2017.

consumer, aging and industry advocates that have been working in this space, the SEC approved an effective and efficient Report & Hold rule that has received the stamp of approval from the federal government as well as aging advocates. FINRA's new Rule 2165 underwent several rounds of notice and comment rulemaking and significantly evolved between its first release in late 2015 (shortly after the NASAA model was first proposed) and its final approval by the SEC on February 3, 2017.

This new rule will be published in the Federal Register shortly and will soon be applicable to Broker-Dealers in Oregon and across the country. As such, we strongly urge the legislature to take note of the robust, 16-month rulemaking process, which included several sets of changes across 4 detailed releases from FINRA and the SEC.[4] Furthermore, by harmonizing any Oregon law with the SEC-approved rule, the legislature can help ensure seamless effective protections of Oregon's seniors and vulnerable adults.

Specifically, we would like to bring the following areas needing such harmonization to your attention. We've also attached suggested language, which would harmonize SB 95 with the SEC-approved rule and federal law with a minimum of changes.

I. Maintaining the State's Current Reporting Status:

- Early in the process, FINRA chose to adopt a voluntary-reporting stance which would allow each state to make an independent decision regarding voluntary versus mandatory reporting status.[5] As such, almost every state that has enacted a Report & Hold law (Washington State, Delaware, Missouri, Indiana and Louisiana) has chosen to maintain their current status. In part, this is due to the significant workload increase and financial impact that mandatory reporting can have – particularly in situations where an overwhelming majority of Broker-Dealers already voluntarily report their reasonable belief of suspected financial exploitation. Moreover, it has been estimated that about 40% of Broker-Dealer reports can be false positives in mandatory reporting jurisdictions over those that permit voluntary reports and thus allow further pre-report investigation by firms. Should the Oregon legislature still wish to consider a change to a mandatory reporting stance, SIFMA strongly urges you to undertake a fiscal analysis to determine the impact of such a workload increase for the State's agencies and ensure sufficient resources to address each report made under the law.

II. Moving Away from the use of "Qualified Individuals"

- In their first revision, FINRA decided to move away from the use of "Qualified Individuals" and keep all of the actions, obligations and protections at the firm-level, as opposed to focusing on individual employees.[6] This has two effects: 1) it avoids complications (i.e., duplicative or low-quality reporting lacking relevant information) that can be caused by placing legal obligations on individuals and mandating reporting in a manner that may conflict with internal escalation requirements, thereby undercutting a

[4] FINRA Regulatory Notice 15-37; SR-2016-039; SR-FINRA-2016-039 - Amendment #1; and SEC Release No. 34-79964.

[5] FINRA Regulatory Notice 15-37.

[6] Note change between FINRA Regulatory Notice 15-37 (initial proposal) and SR-FINRA-2016-039 (second proposal).

firm's ability to effectively supervise its employees; and 2) it ensures that the law does not unintentionally limit firms from adopting innovative fast-response teams dedicated to senior and vulnerable adult protection that are housed outside of a firm's legal, compliance or supervisory structure.

III. Expanding or Harmonizing Third-Party Contact Provisions with Longstanding Federal Law

- As written, Section 4 of SB 95 would permit an action that is already clearly permitted under existing law, and could be unintentionally read to limit the other actions a broker-dealer may take under well established federal law (including the Gramm-Leach-Bliley Act). While several states (including Missouri, Alabama and Indiana) have chosen to expand this reporting provision to provide new tools to the industry, others (such as Louisiana) have added the following clause ensuring that the provision does not weaken well-settled investor protections or conflict with federal law:

  "[…] or any other person permitted under existing state or federal law, rule, or regulation, the rules of a self-regulatory organization, or customer agreement."

  In fact, **no state** with an existing Report & Hold law has adopted the third-party disclosure provision currently in SB 95.

IV. Time Periods and Procedures Regarding Extensions, and Protecting the Discretion and Authority of Investigating Agencies

- The time periods and reporting procedures were updated by FINRA and the SEC from those reflected in the earlier NASAA model to ensure: 1) a level of harmonization with existing state laws; 2) an efficient process that would effectively protect senior investors and vulnerable adults; and 3) that the Report & Hold rule did not curtail the existing authority of state investigating agencies, such as state securities regulators and APS organizations.

  Specifically, the current draft of SB 95 contains internally inconsistent reporting periods,[7] and does not provide any investigating agency – particularly the securities commissioner – with authority to extend a hold without a court order. As such, we urge you to adopt both the time frames and reporting procedures in Sections (b)(2) and (b)(3) of the final federal rule,[8] which are also included in the attachment below.

V. Utilizing a Single Immunity Provision and "Discretion" Standard.

- Finally, in the SEC-approved version, FINRA chose to utilize a single safe-harbor provision that covered all actions taken in accordance with the Report & Hold provision, while utilizing a well-settled legal standard in securities law. Currently, SB 95 fails to provide Broker-Dealers protection for acting in accordance with Section 8 (dealing with

[7] *See* Section 6 of SB 95.
[8] Contained in SR-2016-039 – Amendment No. 1.

recordsharing), and utilizes a unique legal standard not otherwise utilized in securities law, which could have significant unintended consequences in the court system.

VI. Addressing Penalties for Failure to Report.

- Cases of senior financial exploitation are often delicate, nuanced matters that vary wildly based on the facts and circumstances of an individual situation. To make matters worse, many victims of senior financial exploitation often go to significant lengths to hide their victimization – or even protect their victimizers – out of shame or family loyalty. These are difficult situations for everyone involved, including the employees of financial institutions, and threatening such individuals with a Class A violation for failure to comply with current Section 2 of SB 95 will only assist in making a difficult situation worse. This is an unnecessary penalty which would ask the State to judge the actions, in hindsight, of individuals making their best efforts to help their clients.

  To make matters worse, as currently drafted, SB 95 could impose these penalties for technical errors in reporting or lack of information (i.e., forgetting to provide either the nature or extent of the suspected exploitation, or submitting a newly out-of-date address), making the reporting process unnecessarily perilous.

Thank you again for your efforts on behalf of Oregon seniors, and we look forward to the opportunity to work with you to address these issues and better protect investors in your state. If you have any questions or if there is any further information we can provide, please contact either our Salem representative, Elise Brown, at (503) 970-1235 or elisebrown@ebipublicaffairs.com or contact me directly at (212) 313-1317 or mgibson@sifma.org.

Best regards,

/s/

Marin E. Gibson
Managing Director & Associate General Counsel

Encl:
Proposed language harmonizing SB 95 with the SEC-approved Report & Hold rule.

Appendix I:
Proposed Language Harmonizing SB 95 with SEC-Approved FINRA Rule 2165

[…]

Section 2. Governmental Disclosures. If a broker-dealer or investment adviser reasonably believes that financial exploitation of an eligible adult may have occurred, may have been attempted, or is being attempted, the broker-dealer or investment adviser may notify Adult Protective Services and the Division of Securities, Office of the Attorney General (collectively "the Agencies").

Section 3.[9] **Third-Party Disclosures.** If a broker-dealer or investment adviser reasonably believes that financial exploitation of an eligible adult may have occurred, may have been attempted, or is being attempted, a qualified individual may notify any third party reasonably associated with the eligible adult, or any other person permitted under existing state or federal law, rule, or regulation, the rules of a self-regulatory organization, or customer agreement. Disclosure may not be made to any designated third party that is suspected of financial exploitation or other abuse of the eligible adult.

Section 4.[10] **Delaying Disbursements.** (1) A broker-dealer or investment adviser may delay a disbursement from an account of an eligible adult or an account on which an eligible adult is a beneficiary if:

(a) the broker-dealer or investment adviser reasonably believes, after initiating an internal review of the requested disbursement and the suspected financial exploitation, that the requested disbursement may result in financial exploitation of an eligible adult; and

(b) the broker-dealer or investment adviser:

i. Immediately, but in no event more than two business days after the requested disbursement, provides written notification of the delay and the reason for the delay to all parties authorized to transact business on the account, unless any such party is reasonably believed to have engaged in suspected or attempted financial exploitation of the eligible adult;

ii. Immediately, but in no event more than two business days after the requested disbursement, notifies the Agencies; and

iii. Continues its internal review of the suspected or attempted financial exploitation of the eligible adult, as necessary.

(2) The delay of disbursement authorized by this law will expire not later than 15 business

[9] Section 4 in current draft of SB 95.
[10] Section 6 in current draft of SB 95

days after the date that the broker-dealer or investment adviser first placed the delay on the disbursement of funds or securities, unless sooner terminated or extended by the commissioner, an agency of competent jurisdiction or a court of competent jurisdiction, or extended pursuant to part (3) of this Section.

(3) Provided that the broker-dealer or investment adviser's internal review of the facts and circumstances supports the broker-dealer or investment adviser's reasonable belief that the financial exploitation of the vulnerable person has occurred, is occurring, has been attempted, or will be attempted, the delay of disbursement authorized by this law may be extended by the broker-dealer or investment adviser for no longer than 10 business days following the date authorized by part (2) of this Section, unless otherwise terminated or extended by the commissioner, agency of competent jurisdiction or a court of competent jurisdiction.

Section 5.[11] **Records**. A broker-dealer or investment adviser shall provide access to or copies of records that are relevant to the suspected or attempted financial exploitation of an eligible adult to agencies charged with administering state adult protective services laws and to law enforcement, either as part of a referral to the agency or to law enforcement, or upon request of the agency or law enforcement pursuant to an investigation. The records may include historical records as well as records relating to the most recent transaction or transactions that may comprise financial exploitation of an eligible adult. All records made available to agencies under this section shall not be considered a public record as defined in [State public records law].

Nothing in this provision shall limit or otherwise impede the authority of the state securities commissioner to access or examine the books and records of broker-dealers and investment advisers as otherwise provided by law.

Section 7. Immunity. A broker-dealer or investment adviser that exercises discretion in compliance with this law shall be immune from any administrative or civil liability that might otherwise arise from such actions.

[11] Section 8 in current draft of SB 95