QUESTIONS FROM LISTENERS, AND RESPONSES.

Q1. Please confirm that the TCP issue arises under FINRA and thus relates primarily for brokers and that FINRA does not extend to banks to the extent they are not providing broker dealer services.

A1. We can confirm that the TCP issue is solely one that applies to broker-dealers, who are required to be members of FINRA. To the extent that some listeners suggested that others, like financial advisors who are not broker-dealers, are required to conform to these rules or can rely on them (e.g., by disclosing confidential information to a TCP), we believe that that is incorrect. Keep in mind that you can name one TCP for broker one, a second TCP for broker two, and that they need not be the same person. In that situation, broker one may NOT disclose confidential information to TCP two, and vice versa. Nor does that authorize a third party, like a financial advisor (including an attorney, CPA or RIA) who is not a broker-dealer to exchange confidential information with a TCP.

As to the jurisdiction over banks, I personally do not know or understand why or when banks become subject to FINRA rules, except that at least some banks are reading the rules as applying to them. I believe that it is because they have affiliates, including wholly owned subsidiaries, or are otherwise involved in clearing transactions with the broker-dealer, but I am only guessing. As an example that puzzles me, my own bank has designated a TCP for a grantor trust checking account that can only hold cash and no securities, and is not authorized to buy or sell anything at all (although it is linked to a brokerage account at another institution so that funds can be transferred to or from that brokerage account). For this reason, our committee is in communication with certain officials at that bank for some elucidation on this topic, and it is possible that a representative of that bank will join us on a future webinar to explain this better than I can.

Q2. [This is more of a comment than a question]. Re: financial predators - the power to make an amendment to trust during survivorship period implies the trust can be amended and is therefore outside court jurisdiction. When this is the case, courts exercising jurisdiction, they cannot render any enforceable orders. At no time should a financial institution ever take action on any asset without any authority/ly from the account owner. When the financial institution exercises powers it does not have, FINRA does not investigate. The problem with this change in the act is that the financial institution avoids liability when the financial institution is the perpetrator. FINRA does not protect the account holder when the financial institution undertakes transactions without authorization from the account owner. Therefore, when the financial institution is undertaking transactions without authorization, a TCP is a liability not a help.

A2. Agreed that the TCP procedure is not aimed at thefts or other misbehavior by the broker-dealer. I believe that there are separate laws and procedures that apply in those cases, and having a TCP is of no help in that situation. However, I do not know why having a TCP would be a liability, other than perhaps it would enable the misbehaving broker dealer to learn more than it should know.
Q3. Do we know how many DPOA agents are banks/entities rather than a relative/individual? What if caregiver has the password and logs in as without having a power of attorney document? Is it a "crime" for a caregiver to log on as you if they aren't named as the agent in a DPOA?

A3. I don't know the numbers, and I do not know of any source that could provide that information. However, we are assured by those representing banks that they are extremely reluctant to act as attorneys-in-fact.

I think it is obvious on its face that if a caregiver has the password and logs in as the victim, there is a potential crime involved. But it may depend on whether the caregiver has abused the relationship. Keep in mind that many seniors delegate to the caregiver management of the household budget—buying groceries, paying the rent, etc. In doing so, they may give the caregiver confidential information knowingly, including passwords to on-line accounts. In one case I am aware of, the victim gave the caregiver her ATM card to withdraw cash to pay household bills (and the caregiver helped herself to a few "bonuses"). I don't think it matters whether the caregiver has a durable power of attorney ("DPOA") or not. Having a DPOA does not give one authority to pose as the principal. However, most accounts permit you to name an attorney in fact, who can then log in and manage the account. That can include authorizing distributions and even changing the beneficial interests. But the attorney-in-fact should log in as him- or herself, not as the principal. But the bottom line is, whether or not the victim has authorized the caregiver to log into the account, has the caregiver helped himself or herself to funds that investor did not authorize or intend the caregiver to have? If the caregiver has not done that, it may be, "no harm, no foul". On the other hand, proving that the caregiver was not authorized to take funds for himself or herself is a question of credibility, an extremely difficult question of "he said, she said" (or often, "she said, she said" or "he said, he said"). You don't see paper trails. As a practical matter, once the funds are disbursed, it is extremely difficult to trace where they went or to recover them.