



October 1, 2019

Via Email to pubcom@finra.org

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

**Re: Regulatory Notice 19-27 - FINRA Requests Comment on Rules and Issues
Relating to Senior Investors; FINRA Rule 2165**

Dear Ms. Mitchell:

The University of Miami School of Law Investor Rights Clinic (“IRC”) greatly appreciates the opportunity to comment on FINRA Regulatory Notice 19-27. The IRC is a University of Miami School of Law clinical program in which students provide legal assistance to individuals of modest means who have suffered investment losses, but due to the size of their claim cannot find legal representation. Since its opening in 2012, the IRC has assisted numerous elderly investors who have suffered financial losses in their retirement accounts. The IRC has a strong interest in rules relating to the protection of elderly and retired investors.

FINRA is conducting a retrospective review to assess the effectiveness and efficiency of its rules and administrative processes that help protect senior investors from financial exploitation. Accordingly, Regulatory Notice 19-27 seeks comments on FINRA Rule 2165, “Financial Exploitation of Specified Adults.” Rule 2165 permits a member to place a temporary hold on a disbursement of funds or securities from the account of a “Specified Adult”¹ customer when the member reasonably believes that “financial exploitation”² of that adult has occurred, is occurring, has been attempted or will be attempted. The Rule does not require the member to place temporary holds on disbursements of funds or securities where financial exploitation may be occurring. However, Rule 2165 provides members with a safe harbor from FINRA Rules 2010, 2150 and 11870 if the members exercise discretion in placing temporary holds on

¹ “Specific 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.” FINRA Rule 2165(a)(1).

² “Financial exploitation” is defined as: “(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.” FINRA Rule 2165(a)(4).

disbursements of funds or securities from the “accounts”³ of “Specified Adults” consistent with the requirements of this Rule.

The IRC views the protection of senior investors as a top priority. As such, the IRC believes that Rule 2165 should *require* members to place temporary holds on the disbursements of funds or securities where the member reasonably believes financial exploitation may be occurring. In addition, the IRC believes that Rule 2165 should apply not only to disbursements of funds or securities, but to *transactions* in securities by or for the senior investor, as well. Lastly, when a member has a *reasonable belief* that financial exploitation has occurred, may be occurring, or is about to occur, the member should be required to report the exploitation to the relevant authorities.

I. FINRA Rule 2165 Should be Amended to Better Protect Senior Investors

The financial exploitation of senior citizens is a serious and growing problem.⁴ Senior citizens lose an estimated \$2.9 billion annually as a result of financial exploitation, yet the overwhelming majority of incidents go unreported to authorities.⁵ Unfortunately, situations of financial exploitation commonly involve trusted persons in the life of a vulnerable adult, such as: caretakers, family members, neighbors, friends, attorneys, doctors, bank employees, and financial professionals.⁶ Indeed, at the IRC, we have handled cases involving the financial exploitation of senior citizens by their trusted financial advisors.

The financial exploitation of senior citizens is expected to become worse with the aging of America. The “baby boomer” generation is aging fast, with an average of 10,000 Americans turning 65 years old every day.⁷ By the year 2030, “one in five persons in the U.S. is projected to be 65 or older and their numbers are projected to reach 74 million.”⁸ By the year 2050, the elderly population in America is expected to reach 88 million.⁹ With age comes cognitive and

³ “Account” is defined as: “[A]ny account of a member for which a Specified Adult has the authority to transact business.” FINRA Rule 2165(a)(2).

⁴ Financial Industry Regulatory Authority, *Senior Investors*, <https://www.finra.org/rules-guidance/key-topics/senior-investors> (last visited Sep. 9, 2019).

⁵ MetLife Mature Market Institute, *The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation, and Predation Against America’s Elders* (June 2011) <https://www.giaging.org/documents/mmi-elder-financial-abuse.pdf>.

⁶ National Adult Protective Services Association, *Elder Financial Exploitation*, <https://www.napsa-now.org/policy-advocacy/exploitation/> (last visited Sep. 9, 2019).

⁷ Stephen Deane, U.S. Securities and Exchange Commission, Office of the Investor Advocate, *Elder Financial Exploitation: Why is it a concern, what regulators are doing about it, and looking ahead* (June 2018) <https://www.sec.gov/files/elder-financial-exploitation.pdf>.

⁸ *Id.*

⁹ Wan He, Daniel Goodkind, and Paul Kowal, U.S. Census Bureau, *An Aging World: 2015* (Mar. 2016), <https://www.census.gov/content/dam/Census/library/publications/2016/demo/p95-16-1.pdf>.

physical impairment that elevate the risks of senior financial exploitation, like Alzheimer's disease and other forms of dementia.¹⁰ As the senior population continues to grow, regulators, including FINRA, should require firms and financial professionals—who are often the first to recognize signs of decline—to do more to protect investors' life savings.

A. FINRA Rule 2165 Should Require Members to Place Holds on the Disbursements of Funds or Securities Where Financial Exploitation May be Occurring

FINRA Rule 2165 *permits* members to place a temporary hold on disbursements of funds or securities of a "Specified Adult," if the member "reasonably believes that financial exploitation of the Specified Adult has occurred, is occurring, has been attempted or will be attempted." Rule 2165(b)(1)(A). Two days after placing a hold on an account, the member must notify the person(s) authorized to transact business on the account and the "Trusted Contact Person."¹¹ Rule 2165(b)(2)(b). If the member believes the "Trusted Contact Person" is involved in the financial exploitation at issue, the member may contact an immediate family member instead. *Id.* The hold can remain in effect for up to 15 business days and the member can extend the expiration date for an additional 10 business days following internal review. Rule 2165(b)(1)(c).

In Regulatory Notice 17-11, FINRA explained that Rule 2165 gives members the opportunity to "better protect customers from financial exploitation if they have the ability to contact a customer's designated trusted contact person and, when appropriate, place a temporary hold on a disbursement of funds or securities from a customer's account."¹² However, Rule 2165 does not require a hold, but rather provides members with a "safe harbor" when members exercise discretion to protect customers through placing a temporary hold.¹³

To better protect senior investors, Rule 2165 should *require* members to place a temporary hold on disbursements of funds or securities from the accounts of customers in the case of suspected financial exploitation. First, Rule 2165, as written, allows members to ignore the suspected financial exploitation of senior investors, as members are not required to place a temporary hold on the accounts at issue. As discussed further in the IRC's November 30, 2015 Comment Letter to FINRA Regulatory Notice 15-37, the member has no obligation to actually do anything about the suspected financial exploitation of its senior customers under FINRA Rule 2165. "Absent the mandatory language no member firm would be motivated to incur the

¹⁰ Stephen Deane, U.S. Securities and Exchange Commission, Office of the Investor Advocate, *Elder Financial Exploitation: Why is it a concern, what regulators are doing about it, and looking ahead* (June 2018) <https://www.sec.gov/files/elder-financial-exploitation.pdf>.

¹¹ "Trusted Contact Person" is defined as: "The person who may be contacted about the Specified Adult's Account in accordance with Rule 4512." FINRA Rule 2165(a)(3).

¹² Financial Industry Regulatory Authority, Regulatory Notice 17-11, *SEC Approves Rules Relating to Financial Exploitation of Seniors* (Feb. 2018), <https://www.finra.org/sites/default/files/Regulatory-Notice-17-11.pdf>.

¹³ "This Rule provides members and their associated persons with a safe harbor from FINRA Rules 2010, 2150 and 11870 when members exercise discretion in placing temporary holds on disbursements of funds or securities from the Accounts of Specified Adults consistent with the requirements of this Rule." FINRA Rule 2165.

additional costs of implementing the necessary compliance measures to protect its elderly investors.”¹⁴

B. FINRA Rule 2165 Should Apply to Both Disbursements and Transactions in Securities

FINRA Rule 2165 permits members to place a temporary hold on the *disbursement* of funds or securities from the account of a “Specified Adult” if the member reasonably believes that financial exploitation has occurred or may be occurring. Rule 2165(b)(1). However, while placing a hold pursuant to Rule 2165 stops funds or securities from leaving a customer’s account, the rule does not currently apply to transactions in securities by or for the senior investor.¹⁵ For instance, if a customer requests that a long-held position in a blue chip dividend-paying stock be sold and the proceeds used to buy speculative securities, Rule 2165 would not allow the member to refuse to execute the transaction or to place a temporary hold on the transaction even if the firm reasonably believed that financial exploitation has occurred or may be occurring.¹⁶ Rule 2165 allows members to place a hold on the disbursements of funds or securities only—not on the transactions that occur within the account.

In its June 2018 “Elder Financial Exploitation” Report, the SEC explained that the disbursement of money or securities out of a customer’s account has “far more severe” consequences than a transaction within the account.¹⁷ “Disbursement(s) can have a devastating impact, as when, for example, fraudsters persuade the elderly to empty their entire retirement or brokerage account and send it overseas. There the money vanishes without a trace, leaving no way to recover it.”¹⁸ The SEC did acknowledge that “it is possible to envision circumstances of financial exploitation in which a transaction results in harm to the victim, even if the assets remain in the account.” However, the SEC explained that the sale of a security is still “less damaging” because the proceeds remain in the customer’s account.¹⁹

¹⁴ Public Investors Advocate Bar Association, *Proposed Rule Change to Amend Rule 4512 (Customer Account Information) and Adopt FINRA Rule 2165 (Financial Exploitation of Specified Adults)* (Nov. 28, 2016), <https://piaba.org/piaba-newsroom/comment-letter-proposed-rule-change-amend-rule-4512-customer-account-information-and>.

¹⁵ Financial Industry Regulatory Authority, Regulatory Notice 19-27, *FINRA Requests Comment on Rules and Issues Relating to Senior Investors* (Aug. 2019), <https://www.finra.org/rules-guidance/notices/19-27>.

¹⁶ *Id.*

¹⁷ Stephen Deane, U.S. Securities and Exchange Commission, Office of the Investor Advocate, *Elder Financial Exploitation: Why is it a concern, what regulators are doing about it, and looking ahead* (June 2018) <https://www.sec.gov/files/elder-financial-exploitation.pdf>.

¹⁸ *Id.*

¹⁹ *Id.*

Yet, senior investors can be exploited through transactions as well as disbursements.²⁰ As such, Rule 2165 should apply not only to disbursements of funds or securities, but to *transactions* in securities by or for the senior investor, as well. At the IRC, we've handled cases where senior investors suffer serious financial losses in their life savings as a result of unauthorized trading, excessive trading (*i.e.* churning), unsuitable trading, and even variable annuity switching within the senior investor's account. The consequences are no less severe than those that occur when money from a retirement account is disbursed.

For example, the IRC has represented an 85-year old retiree suffering from dementia, whose son (who was living with her) was able to log onto her brokerage account online. The son spoke with a representative at the firm, who advised him to place the account on margin so that he would have greater purchasing power. Although the son did not have authority on his mother's account, he sold her limited assets and commenced day-trading speculative securities. Our client learned of her losses when the firm closed her account and notified her that she lost almost all of her life savings. If Rule 2165 allowed members to put a hold on both transactions and disbursements where the member reasonably believed that financial exploitation may be occurring, then the respective member in the above referenced case could have put a stop to the fraudulent conduct that occurred in the elderly woman's account. However, because no funds were disbursed, Rule 2165 did not apply to the above transactions in dispute.

When a member firm reasonably believes that financial exploitation may be taking place, the firm should be able to place a temporary hold on a transaction that could have devastating consequences for its elderly clients. Expanding the rule to include suspicious transactions would better protect elderly investors and other vulnerable adults.

C. RULE 2165 Should Mandate Firms to Report Financial Exploitation and Abuse to Relevant Authorities

FINRA Rule 2165 contains no reporting requirements, even when a member places a temporary hold on disbursements where financial exploitation has occurred. Without restating the IRC's entire position from its Comment Letter to FINRA Regulatory Notice 15-37, the IRC once again emphasizes the critical role of reporting financial exploitation to relevant authorities. Many states already require financial firms to report suspected exploitation. Adding a mandatory reporting obligation to Rule 2165 would provide uniform protection for the most vulnerable of the nation's investors. Moreover, a mandatory reporting requirement would encourage member firms to provide training on signs of potential financial abuse or exploitation in order to avoid liability. Attorneys, accountants, doctors, nurses, and other health professionals all have mandatory reporting requirements for elderly and vulnerable persons;²¹ members of FINRA should have no less the same mandatory reporting requirements as other professionals.

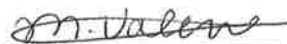
²⁰ Financial Industry Regulatory Authority, Regulatory Notice 19-27, *FINRA Requests Comment on Rules and Issues Relating to Senior Investors* (Aug. 2019), <https://www.finra.org/rules-guidance/notices/19-27>.

²¹ National Adult Protective Services Association, Elder Financial Exploitation Advisory Board, *2013 Nationwide Survey of Mandatory Reporting Requirements for Elderly and/or Vulnerable Persons* (Aug. 2013), <http://www.napsa-now.org/wp-content/uploads/2014/11/Mandatory-Reporting-Chart-Updated-FINAL.pdf>.

II. Conclusion

The IRC is committed to protecting senior investors and other vulnerable adults and strongly supports FINRA's efforts to provide protection to this susceptible group. In summary, the IRC asks that FINRA amend Rule 2165 to address the foregoing shortcomings in its current form. The IRC thanks FINRA for the opportunity to comment on this important topic.

Respectfully,



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