



PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION

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November 28, 2016

Brent Fields, Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: SR-FINRA-2016-39 – Proposed Rule Change to Adopt FINRA Rule 2165 Relating to Financial Exploitation of Seniors and Other Vulnerable Adults

Dear Secretary Fields:

I write on behalf of the Public Investors Arbitration Bar Association (“PIABA”), an international bar association comprised of attorneys who represent investors in securities arbitrations. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and industry misconduct. Our members and their clients have a strong interest in rules promulgated by the Financial Industry Regulatory Authority (“FINRA”) relating to investor protection. In particular, our members and their clients have a strong interest in rules relating to the protection of elderly and retired investors and the supervision of associated persons who serve these investors.

SR-FINRA-2016-39 seeks comments on proposals to amend FINRA Rule 4512 (Customer Account Information)¹ and adopt new FINRA Rule 2165 (Financial Exploitation of Specified Adults) to address the financial exploitation of seniors and other vulnerable adults. New FINRA Rule 2165 would permit “qualified persons” of firms to place temporary holds on disbursements of funds or securities from the accounts of specified customers where there is a reasonable belief of financial exploitation of those customers. Rule 2165 does not create an obligation to place a hold on funds or securities where financial exploitation may be occurring, but it provides member firms with a safe harbor from other FINRA Rules when firms do exercise this discretion in placing temporary holds.

On November 30, 2015, PIABA commented on Regulatory Notice 15-37 (the “November 2015 PIABA Letter”) in support of FINRA moving forward with a rule change that addresses the serious issue of financial exploitation. However, PIABA also suggested that several important changes be made to proposed Rule 2165 and those suggestions have not been addressed in the most recent iteration of the proposed rule. PIABA discusses the two most significant omissions below:

¹ PIABA supports the proposed amendment to FINRA Rule 4512 because it will result in the identification of a trusted contact for the immediate reporting of possible financial exploitation of a customer.

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A. Rule 2165 Does Not Obligate Firms to Report to Relevant Authorities Financial Exploitation and Abuse

Proposed Rule 2165(b)(1) (Temporary Hold on Disbursements) states that:

A member *may place* a temporary hold on a disbursement of funds or securities from the Account of a Specified Adult if: (A) The member reasonably believes that financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted; and (B) The member, not later than two business days after the date that the member first placed the temporary hold on the disbursement of funds or securities, provides notification orally or in writing, which may be electronic, of the temporary hold and the reason for the temporary hold to: (i) all parties authorized to transact business on the Account; and (ii) the Trusted Contact Person(s), unless the Trusted Contact Person is unavailable or the member reasonably believes that the Trusted Contact Person(s) has engaged, is engaged, or will engage in the financial exploitation of the Specified Adult; and (C) The member immediately initiates an internal review of the facts and circumstances that caused the member to reasonably believe that the financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted.

As detailed in the November 2015 PIABA Letter, mandatory reporting is an essential component of the Model Legislation or Regulation to Protect Vulnerable Adults from Financial Exploitation (“Model Act”) adopted by the North American Securities Administrators Association, Inc. (“NASAA”) earlier this year.

Ideally, for the sake of investor clarity, states adopting their own versions of the Model Act will try to maintain uniformity with respect to the ways in which customers are protected. For example, the Model Act, implicitly recognizing the importance of mandatory reporting to the goal of preventing incidents of financial abuse, **requires** “qualified individuals”² to report to state securities regulators and adult protective services agencies if they have a reasonable belief that financial exploitation has been attempted or has occurred. Nonetheless, not every state will adopt the Model Act and those states that do adopt the Model Act may choose to implement a reporting requirement that is not mandatory. Unfortunately, inconsistent approaches among states will invariably lead to uneven protection for vulnerable adults.

As previously suggested by PIABA, making the reporting obligation of proposed Rule 2165 mandatory, rather than discretionary, would provide the uniform protection needed for vulnerable adults in our nation. The only “reason” that FINRA provided as to why proposed Rule 2165 would not be revised to require member firms to report a reasonable belief of financial exploitation to appropriate authorities was that reporting requirements should be left to the states. See SR-FINRA-2016-39 at 72-73. This approach by FINRA will simply leave states that do have reporting requirements with responsibility for determining whether broker-dealers are complying with such requirements. It does nothing to change the obligations of member firms to report reasonably believed financial exploitation of vulnerable investors and will leave many such investors unprotected.

² NASAA’s Model Act defines “qualified individual” as any agent, investment adviser, representative or person who serves in a supervisory, compliance, or legal capacity for a broker-dealer or investment adviser. Section 2 (7), Definitions.

B. A Firm Should Have an Obligation to Place a Temporary Hold on Disbursement of Funds or Securities When It Has Reasonable Suspicion of Financial Exploitation or Abuse

Without restating PIABA's entire position from its November 2015 Letter *verbatim*, PIABA emphasizes its belief that the permissive language of Rule 2165 would allow a broker-dealer to *ignore* evidence of financial exploitation of a vulnerable adult. As the rule is currently written, a broker-dealer or registered person who has a reasonable belief that a vulnerable adult is being financially exploited does not have to place a temporary hold on the disbursement of funds or securities. To adequately protect the elderly investing population in those circumstances, a member firm should be *required* to place a temporary hold. That is the only means of preventing or mitigating the dissipation of its vulnerable customers' assets.

PIABA does not stand alone on this issue. FINRA's approach drew significant criticism from other public advocates. For example, Georgia State explained that while it supported the effort, the proposed rule gave the industry a safe harbor to keep assets within the firm without imposing any obligation to actually do anything.³ The University of Miami School of Law also asked for changes, explaining that the rule "creates no obligation" to do anything about known exploitation.⁴ In an article forthcoming in the *University of Cincinnati Law Review*, Professor Benjamin P. Edwards characterized FINRA's approach as "illusory rule-making activity" because this purported senior protection rule does not actually require FINRA's member firms to protect seniors.⁵ The rule does not even help seniors looking to protect themselves because it provides for no mechanism for the public to differentiate between firms that "that commit to senior-protection policies from those that do not."⁶

Under the rule as written, a broker-dealer could simply ignore evidence of financial exploitation without consequence. FINRA stated it "believes that a member can better protect its customers from financial exploitation if the member can use its discretion in placing a temporary hold on a disbursement of funds or securities from a customer's account." See SR-FINRA-2016-39 at 26. However, the permissive, rather than mandatory, language incentivizes member firms to simply ignore the rule. Absent the mandatory language no member firm would be motivated to incur the additional costs of implementing the necessary compliance measures to protect its elderly investors. If member firms are not motivated to comply with this rule, then the rule cannot and will not be effective.

Thus, PIABA reiterates its suggestion that a broker-dealer be required to place a temporary hold on the disbursement of funds or securities when financial exploitation of a vulnerable customer is reasonably believed to have been attempted or to have occurred. Moreover, if a member firm does not act on a reasonable belief of financial exploitation, or ignores information that may lead to a reasonable belief of financial exploitation, that firm should be subject to some penalty.

³ GEORGIA STATE UNIVERSITY COLLEGE OF LAW INVESTOR ADVOCACY CLINIC, COMMENTS ON PROPOSED FINRA RULE ON FINANCIAL EXPLOITATION OF SENIORS AND VULNERABLE ADULTS 1-2 (2015), available http://www.finra.org/sites/default/files/15-37_georgia-state-law_comment.pdf ("the Proposal also allows a Qualified Person to use their discretion to ignore a reasonable belief that financial exploitation is likely and do nothing").

⁴ UNIVERSITY OF MIAMI SCHOOL OF LAW INVESTOR ADVOCACY CLINIC, PROPOSED RULES RELATING TO FINANCIAL EXPLOITATION 5 (2015), available http://www.finra.org/sites/default/files/15-37_University-Miami-School-Law_comment.pdf (explaining that the proposed rule "would allow a broker-dealer to *ignore* evidence of financial exploitation" without reporting the suspected exploitation or putting a hold on the account) (emphasis in original).

⁵ See Benjamin P. Edwards, *The Dark Side of Self-Regulation*, UNIVERSITY OF CINCINNATI LAW REVIEW, forthcoming. Available at SSRN: <https://ssrn.com/abstract=2829592>.

⁶ *Id.*

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C. Conclusion

In summary, PIABA asks that FINRA amend proposed Rule 2165 to address the issues set forth above and in the November 2015 PIABA letter. PIABA thanks you for the opportunity to comment on this important topic.

Very truly yours,



Marnie Lambert
PIABA President