UNIVERSITY OF MIAMI
SCHOOL of LAW

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December 2, 2020

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 20-34 – FINRA Requests Comments for Proposed Amendments to FINRA Rule 2165

Dear Ms. Mitchell:

The University of Miami School of Law Investor Rights Clinic ("IRC") greatly appreciates the opportunity to comment on the proposed amendments to FINRA Rule 2165.[1] The IRC is a University of Miami School of Law clinical program that represents investors of modest means who have suffered investment losses, but due to the size of their claims cannot find legal representation. As the only *pro bono* organization in Florida assisting investors of modest means, the IRC has assisted numerous elderly investors who have suffered financial losses. For many of our clients, these losses represent their life savings. The IRC has a strong interest in rules relating to the protection of elderly investors.

I. FINRA's Proposed Amendments to Rule 2165(a)

In February 2017, the Securities Exchange Commission ("SEC") approved the adoption of the new FINRA Rule 2165, which allowed members 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.[2] Additionally, the SEC further approved amendments to FINRA Rule 4512[3] to require members to make reasonable efforts to obtain the name of and

[1] FINRA Rule 2165 – Financial Exploitation of Specified Adults.

[2] Financial Exploitation means: "(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 power of attorney, guardianship, or any other authority regarding the 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).

[3] FINRA Rule 4512 – Customer Account Information.

contact information for a trusted contact person for a customer's account. New Rule 2165 and the amendments to Rule 4512 became effective February 5, 2018. In August 2019, 18 months after the effective date, FINRA conducted a retrospective review of FINRA Rule 2165 to determine what changes, if any, should be made. The IRC submitted a comment letter during the retrospective review.[4]

Currently, Rule 2165 provides brokerage firms with a safe harbor to place a temporary hold on a disbursement of funds or securities from the account of a Specified Adult[5] customer for up to 25 business days. The rule also provides that this period may be terminated or extended by a state agency or a court of competent jurisdiction. As a result of its retrospective review, FINRA is proposing two amendments to Rule 2165. The first amendment would allow firms to place holds on *securities transactions* when the firm reasonably believes financial exploitation of a Specified Adult has occurred, is occurring, has been attempted or will be attempted. Second, FINRA proposes to extend the temporary hold period for an additional 30 business days. The IRC fully supports FINRA's proposed amendments as they will provide greater protection to seniors and vulnerable adults that may be victims of financial exploitation.

A. Rule 2165's Safe Harbor Should Be Extended to Apply to Transactions in Securities in Addition to Disbursements of Funds and Securities

There is substantial damage that can result from exploitation in securities transactions. As FINRA acknowledges in the Notice, at least 16 states already allow investment advisers or broker-dealers to place some form of hold on securities transactions as well as disbursements.[6] Someone who is in a position of trust can gain access to the customer's brokerage account and direct the liquidation of securities that have been held for years. Even if the firm decides to place a hold on the subsequent disbursement of the sale proceeds, significant damage may have already occurred, including tax consequences to the customer.

In other cases, a person of trust may decide to take control of the account and engage in speculative trading. For example, the IRC represented an elderly client whose son gained access to her account, sold her securities holdings, and then engaged in the purchases of speculative securities on margin. Unfortunately, in a very short time, she lost most of her funds.

Extending Rule 2165's safe harbor to include securities transactions would provide the firm with the opportunity to halt the sale of long-held securities where there is an objectively

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[4] University of Miami School of Law Investor Rights Clinic Comment Letter dated October 1, 2019.

[5] A Specified Adult is: "(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).

[6] Financial Industry Regulatory Authority, Regulatory Notice 20-34, *Proposed Amendments to FINRA Rule 2165 and Retrospective Rule Review Report* at 6 (Oct. 5, 2020), https://www.finra.org/rules-guidance/notices/20-34.

reasonable belief that financial exploitation is occurring. The proposed holds for securities transactions need not be established for the maximum amount of time allowed by the rule. For example, if the firm is able to quickly verify whether exploitation is occurring, it can unfreeze the transaction, causing virtually a minimal disruption on the customer's investments. Moreover, appropriate policies, procedures, and training can minimize the misapplication of the rule. The IRC applauds and fully supports the hold extension to securities transactions.

B. Rule 2165's Temporary Hold Should be Extended as Proposed

Detecting financial exploitation may take more than thirty (30) days. If a firm needs to go beyond the twenty-five days it is likely because there is a high probability of financial exploitation. Indeed, it may be harder for the firm to detect financial exploitation when the trusted person is the one engaging in the exploitation. For example, a trusted person may be misrepresenting the needs or wishes of a senior who has diminished capacity. Therefore, the firm will need the time to conduct its due diligence in determining if there is an issue, including whether the trusted contact is the one that is behind the financial exploitation.

The proposed thirty additional days will allow for a more thorough and precise investigation. However, the Clinic takes the position that if the account is put on hold, the customer should still be allowed to make certain withdrawals from his or her account. For example, if a senior is suspected of being financially exploited, his or her account will be put on a temporary hold for a maximum of fifty-five days based on the proposed amendment. There may be expenses or fees that need to be covered throughout that time, therefore, it should not be a complete hold on the account. Periodic or "normal" transactions should still be allowed to be made during this period.

II. Additional Suggested Improvements to Protect Seniors From Financial Exploitation

Senior exploitation is a significant problem with losses of nearly $3 billion per year.[7] According to a Met Life study conducted in 2009, "the 'typical' victim is between 70 and 89, white, female, frail, cognitively impaired, trusting, and often lonely or isolated."[8] The study also noted that over 40% of the perpetrators of abuse were family, spouses, and caregivers and 18% of the perpetrators were trusted professionals such as attorneys, financial professionals, and fiduciary agents.[9]

As we explained in our October 2019 letter, Rule 2165 is a safe harbor, providing firms the ability to place holds on disbursements and, if amended, securities transactions. However,

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[7] Teresa Verges, *The Broker-Dealer's Role in the Detection and Prevention of Elderly Financial Exploitation*, 23 PIABA B.J. 231 (2016).

[8] Teresa Verges, *Legal Ethics and an Aging Population: Securities Practitioners' Roles in Preventing Financial Exploitation of the Elderly*, YES PRACTICING LAW INSTITUTE 1, 2 (2017).

[9] *Id.*

the rule does not require firms to do so. This does not incentivize a firm to actually put policies in place, written supervisory procedures, and training to actually protect vulnerable adults. FINRA should consider amendments to Rule 2165 *requiring* firms to implement such procedures. This is beneficial for senior investors because it will give them a guarantee that their accounts or transactions will be placed on hold until an investigation ensues.

Furthermore, Rule 2165 is only triggered when there is suspected financial exploitation. FINRA should consider what member firms should do if their customer is dissipating assets because of increasing cognitive decline or dementia. At minimum, firms should be encouraged to implement written supervisory procedures that include contacting a "trusted contact person" to alert that person of any red flags or concerns.

III. Conclusion

The IRC is committed to protecting senior investors and other vulnerable adults. The IRC strongly supports FINRA's efforts to provide further protection to this susceptible group. In summary, the IRC asks that FINRA adopt the proposed amendments, and in addition make the mandatory hold period a requirement when there is suspicion of senior financial exploitation. The IRC thanks FINRA for the opportunity to comment on this important topic.

Respectfully,

/s/ *Fabian Garcia*
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Investor Rights Clinic, *Legal Intern*

/s/ Sean Hughes
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