October 8, 2019

Submitted via e-mail: pubcom@finra.org

FINRA
1735 K Street, NW
Washington, DC 20006

Re: Regulatory Notice 19-27

To Whom It May Concern:

Thank you for the opportunity to provide feedback on the recently enacted FINRA Rule 2165 and the amendments to Rule 4512. SIFMA[1] appreciates the work that FINRA has undertaken to protect senior and vulnerable adults from financial exploitation, and we believe these rules have been helpful new tools in the fight against financial exploitation.

Financial exploitation of senior and vulnerable adults is a serious issue that has implications for the individual as well as the nation. On the individual level, seniors may lose their savings to bad actors, leaving them unable to maintain their independence or pay for their own healthcare. At a national level, seniors lose an estimated $2.9 billion every year in cases of financial exploitation reported by media outlets, while only an estimated 1 in 44 cases is ever reported to the authorities. We know the true cost of financial exploitation is in the billions of dollars, but data has been difficult to pull together due to the low percentage of documented cases.[2] We appreciate that FINRA is looking to further improve and expand the tools available to firms to help combat financial exploitation.

I. Report and Hold Rule 2165

a. FINRA 2165 Should be Expanded to Include Transactions

Rule 2165 permits a financial services provider to place a temporary hold on a disbursement of funds from the account when the firm reasonably believes there is financial exploitation. This has been a helpful tool in protecting assets from inappropriately leaving the institution and enriching bad actors. However, this tool is only able to protect investors from one part of the preventable harm they face when they are exploited. For this reason, we appreciate FINRA asking whether they

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

[2] We are hopeful that passage of the bi-partisan, bi-cameral Senior Security Act will help lead to the collection of more data. The legislation, introduced by Rep. Josh Gottheimer (D-NJ) and Rep. Trey Hollingsworth (D-IN) passed the House on April 30, 2019, and is still awaiting Senate movement.

should expand the rule to also protect investors from exploitative transactions. FINRA should. Expanding the rule to include transaction protections will help protect against exploitative purchases, sales or asset liquidations, which are some of the types of transactions that can lead to significant harm.

Some examples include selling out of a variable annuity which could lead to surrender charges, or an exploiter prematurely selling certain securities, which will lead to penalties assessed against the account that cannot be recovered. Exploitation of senior and vulnerable investors can result in the sale of long-held blue-chip stocks with a low tax basis, significantly increased tax liabilities, and investors being unable to repurchase advantaged shares which are no longer publicly available. Exploitative transactions can also directly endanger an investor's quality of life. One far-too-common example that involves both exploitative sales and purchases is that of a client who is coerced into liquidating safe, income-producing investments (which may be funding their retirement or medical care) in order to invest in high-risk or volatile products to the benefit of the bad actor – generally over the objections of their financial advisor.

Bad actors continue to devise more sophisticated scams, and if we only limit protections to account disbursements then we are leaving investors more vulnerable than they need to be.

We have generally heard two concerns raised about such an expansion: 1) the impact of market movements, and 2) best execution requirements. With respect to market movements, we recognize that there may be some movement in sales or purchase prices during the period of a hold. To this end, it is important to remember that such holds are placed because of a reasonable suspicion of financial exploitation which, in most cases, would rise to the level of a civil or criminal violation if substantiated. The high likelihood that an investor is being exploited – and is facing potentially devastating financial losses – far outweighs the limited risk of a substantial market movement.

On the issue of best execution requirements, a temporary hold would be placed on a transaction before best execution requirements ever attach. While a financial institution must trade at the best price under the prevailing circumstances,[3] the requirements only apply during the actual buying or selling. There are many situations under current law where a broker-dealer can hold execution, including when evaluating the validity of a power of attorney[4] or whether there is criminal activity that needs to be prevented,[5] among other situations.[6] Further, one-third of the entire U.S.

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[3] FINRA describes the best execution obligation as using reasonable diligence to ascertain the best market for the security and buying or selling in such market so that the resultant prices are as favorable as possible under market conditions. FINRA Rule 5310 "Best Execution and Interpositioning."

[4] The Uniform Power of Attorney Act, which has been enacted across dozens of states specifically enumerates six instances in which a power of attorney may be rejected. One such situations, in section 120(b)(6) of the Uniform Power of Attorney Act, is when an individual has made or has knowledge of a report to APS stating a good faith belief, "that the principal may be subject to physical or financial abuse, neglect, exploitation or abandonment by the agent or person acting for or with the agent."

[5] 36 states have specific language in their statutes criminalizing financial exploitation, while 14 states prosecute financial exploitation under their existing criminal codes (e.g., theft, conversion, assault). Hansen, K., Hampel J., Reynolds, S., Freeman, I. "Criminal and Adult Financial Exploitation Laws in the United States: How Do the Statutes Measure Up to Existing Research?" Mitchell Hamline Law Review, Vol. 42, Issue 3, Article 3.

[6] For more information on the importance of transaction holds and the best execution question, see SIFMA's White Paper, available at: https://www.sifma.org/resources/submissions/senior-investor-protection-white-paper-transactions-v-disbursements/.

population – living in 11 different states – already benefits from broader, transaction-based protections under state law.[7,8]

FINRA also has raised an important issue in asking whether financial institutions would like to be able to apply a hold in a situation of cognitive decline where there is no reasonable suspicion of financial exploitation. We would welcome further conversations on this topic. There would be clear benefits to our clients if we had the option to hold a disbursement or a transaction in such circumstances, although we recognize that crafting a workable regulatory solution for the wide variety of issues that could arise would likely need a separate legal framework. It is possible that other laws might also need to catch up – and work in concert with FINRA rules – to determine how best to address protecting clients who suffer from declining mental capacity. We look forward to working with FINRA to devise the right solution.

b. FINRA Should Extend the Length of Time for Temporary Holds

Currently, 2165 allows firms to place a temporary hold on an individual's account for up to 25 business days. The rule states that this period may be extended by a state agency or a court. We find that the number of days is often too short for the issues to be resolved, and that it can be difficult to obtain an extension from a state agency or a court. We propose extending the period of time to 60 business days, or, in the alternative, a period of time that is consistent with the average length of time that it would take Adult Protective Services (the most common state agency responsible for investigating these issues) to investigate a case of financial exploitation.[9] An extension should also be permitted whenever a firm has knowledge of an ongoing governmental investigation, as opposed to at the request of an investigating agency.

When we are reliant on others, then we are reliant on their timeframes. In some jurisdictions, the local APS has placed cases of financial exploitation on a lower priority due to resources or other limitations. Our members try to protect our clients, and document their efforts to do so, but frequently need additional time to receive feedback from an agency with investigative authority. Currently, the hold **can** be extended by state agencies – such as APS – but those agencies often are hesitant to request an extension of a hold because their investigation is ongoing, and they have not yet determined whether actionable exploitation exists. Permitting the firm to extend a hold to maintain the status quo – so long as the firm has knowledge of a state agency's ongoing investigation – would be a simple solution to this issue. APS offices are far more likely to notify a firm that an investigation is ongoing than they are to specifically request the extension of a hold. SIFMA is also advocating for changes to state laws to facilitate better communication between agencies and reporting firms, and we believe there is an opportunity for FINRA to help further educate such agencies on the use of Rule 2165.

To this end, we also request FINRA's assistance in educating as many APS offices and workers across the country as possible on these issues. While we have worked to create a positive

[7] Based on 2010 Census numbers.
[8] Arizona, California, Kentucky, Minnesota, Mississippi, New Mexico, North Dakota, Texas, Utah, Virginia, Washington State
[9] We would encourage FINRA to seek this information either from individual states, or from the National Adult Protective Services Association. We only have anecdotal information.

relationship with the National Adult Protective Services Association, and have spoken multiple times at their Annual Conference, we know that many APS offices are not aware of the hold as a tool that firms may use to stop money from leaving an account in a situation of financial exploitation.

FINRA Rule 2165 has already played an important role in firms' senior investor protection practices. However, because a 2165 hold is only one piece of the investor protection framework, the data requested by FINRA is not immediately available. The reason for this is that it is difficult to differentiate between different "types" of holds a firm can place. Sometimes a firm may place a hold under Rule 2165, but other times a hold may be placed under a state law (particularly in states that provide transaction protections) or based on language in their client agreements – sometimes a hold may even be placed under all three. These three pieces (FINRA rules, state laws and client agreements) are beginning to come together to form a very effective, highly integrated senior investor protection legal framework that will benefit generations to come. The fact that it is difficult to separate these three types of actions from a data perspective is proof of how effectively the FINRA rules have been integrated with other laws, as well as the ongoing collaboration between FINRA, the states and the industry. Anecdotally, SIFMA is aware of several hundred 2165 holds. More important is the fact that when a firm places a hold – regardless of the type of hold – the initial suspicion of financial exploitation is overwhelmingly substantiated.

In terms of the length of the holds, we see great variance because each situation can be so unique. Some holds can be as short as one day if the firm is able to quickly determine the facts of the situation, while other holds could last several months where APS and local law enforcement need to engage.

II. Rule 4512

We appreciate FINRA's creation of Rule 4512, which requires firms to request from a client the name of a trusted contact with whom the firm may communicate under certain circumstances. Some of our firms have found this request to be an opportunity to expand their conversations with their clients in very positive manners, leading to deeper discussions with the clients creating greater connections to help insulate against future exploitation.

III. Reporting Requirements

The industry is concerned about bad actors filing malicious complaints against an advisor after a firm places a temporary hold on an account. We urge FINRA to consider developing a specific hold-related problem code and to release guidance that such hold-related complaints should be reportable against the firm and not be allocated to an individual advisor's Form U-4 – regardless of whether the hold was placed pursuant to Rule 2165, state laws or a firm's client agreement. This is important because an individual advisor does not have the authority to place a temporary hold and an advisor should not be penalized for actions that the firm takes – regardless of how the complaint is drafted. This would also prevent bad actors from using the threat of a complaint to try and achieve their malicious goals.

IV. Financial Advisor Relationships with Clients – Lending Arrangements, Beneficiary Status, Power of Attorneys and Similar Positions

Based on the existing regulatory framework, firms have established robust policies and compliance practices that severely restrict the types of relationships or arrangements raised in this regulatory notice. Financial advisors often must prove a familial or other close personal relationship before entering into such an arrangement – which is not always a simple process. Even then, when the financial advisor has proven a close relationship exists, firms often place heightened scrutiny on the client accounts involved or require that such accounts be handled by another branch. These policies and practices have proven to be highly effective at SIFMA member firms and we caution against changes in the underlying rules or any blanket prohibitions – there a many cases where such a relationship not only makes sense, but is preferred, such as when an only-child and financial advisor becomes a parent's power of attorney. We welcome an additional opportunity to discuss such situations with FINRA in more detail.

V. General Effectiveness, Challenges and Economic Impact

New rule 2165 and the amendments to rule 4512 have been very effective tools in the industry's fight against the financial exploitation of clients. We appreciate FINRA's hard work in putting these valuable rules in place and believe that now is the time to expand the rules to provide investors with fuller protections.

VI. Conclusion

Thank you for the opportunity to comment. We look forward to discussing these issues further.

Sincerely,

Lisa J. Bleier

Managing Director