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Via Email to pubcom@finra.org

Ms. Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 15-37 – Proposed Rules Relating to Financial Exploitation of Seniors and Other Vulnerable Adults; Proposed FINRA Rule 2165

Dear Ms. Asquith:

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.

Regulatory Notice 15-37 seeks comments on proposed rules to address the financial exploitation of seniors and other vulnerable adults.[1] New FINRA Rule 2165 (Financial Exploitation of Specified Adults) would permit "qualified persons"[2] 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. The rule creates no obligation to place a hold on funds or securities were financial exploitation may be occurring, but provides a safe harbor to firms who exercise discretion to place the temporary hold in such circumstances.

PIABA is generally supportive of proposed Rule 2165 because, among other things, it recognizes that registered persons are often in the best position to learn of, and prevent or mitigate, the financial exploitation of

[1] Regulatory Notice 15-37 also proposed amendments to Rule 4512 (Customer Account Information) that would require firms to obtain the name of and contact information for a trusted contact person for a customer's account. PIABA supports these proposed amendments because they will provide an outlet to immediately report suspicious activity to a trusted individual.

[2] A "qualified person" is defined as "an associated person of a member who serves in a supervisory, compliance or legal capacity" that is reasonably related to the account of the specified adult. Rule 2165(a)(3). Subsection (a)(1) of the rule defines "specified adult" as a natural person who is age 65 or older, or 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."

their clients. However, PIABA believes that the proposed rule does not go far enough to reach its aim of protecting senior investors and other vulnerable adults because it does not obligate a firm to report financial exploitation to appropriate authorities or place a temporary hold on disbursements even when it has a reasonable suspicion of financial exploitation or abuse, and it does not create a penalty for willfully ignoring evidence of abuse. Therefore, PIABA proposes several important changes to the proposed rule that would better protect senior investors and vulnerable adults from financial exploitation.

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

There is a need for strong protection of the elderly investing population. With roughly one out of every five Americans 65 years and older being the victim of financial abuse,[3] the elderly are estimated to lose up to $2.9 billion per year from scams.[4] These figures are likely lower than the true figures since they only account for frauds that are reported, and seniors are "less likely" to report being scammed.[5] Moreover, financial exploitation of seniors is expected to significantly increase as the U.S. population ages.

Registered persons are in the perfect position to recognize signs and symptoms of diminished capacity and dementia with respect to their clients' ability to handle their finances and prevent elder financial abuse.[6] Financial advisors frequently become aware of suspicious activity before family and friends.[7] As such, when there are reasonable grounds to believe its client is being financially exploited, the member firm should be obligated to report potential exploitation to proper authorities.

A mandatory reporting obligation is a central component of the proposed Model Legislation or Regulation to Protect Vulnerable Adults from Financial Exploitation ("Model Act"),[8] recently proposed The North American Securities Administrators Association, Inc. ("NASAA"). The purpose of the Model Act is to protect senior-aged investors from financial exploitation, ideally with uniform parameters that all states will adopt for investor clarity.

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[3] *See* E.S. Browning, *Financial Scammers Increasingly Target Elderly Americans*, WALL ST. J. (Dec. 23, 2013), http://www.wsj.com/articles/SB10001424052702303330204579248292834035108. This is the equivalent of more than seven million Americans. *See* INVESTOR PROTECTION TRUST, *Preventing Elder Investment Fraud*, http://www.investorprotection.org/protect-yourself/?fa=protect-seniors (last visited July 29, 2015).

[4] Mason Braswell, *Unraveling Minds*, INVESTMENTNEWS, (Nov. 3, 2014).

[5] FEDERAL BUREAU OF INVESTIGATION, *Fraud Target: Senior Citizens*, https://www.fbi.gov/scams-safety/fraud/seniors (last visited July 29, 2015).

[6] *See* Naomi Karp & Ryan Wilson, Protecting Older Investors: The Challenge of Diminished Capacity, AARP PUBLIC POLICY INSTITUTE 17 (Nov. 2011), http://www.aarp.org/content/dam/aarp/research/public_policy_institute/cons_prot/2011/rr2011-04.pdf.

[7] *Id.*

[8] NASAA's Board of Directors issued a notice seeking comments on the proposed Model Act on September 29, 2015; the comment period closed on October 2, 2015.

The Model Act requires a "qualified employee"[9] to notify Adult Protective Services and the commissioner of securities if the employee reasonably believes that financial exploitation of an "eligible adult"[10] "may have occurred, may have been attempted, or is being attempted."[11]

NASAA's Model Act implicitly recognizes that requiring member firms to report suspected financial abuse to the appropriate authorities is a necessary step towards the goal of preventing incidents of financial abuse. Even if NASAA's final version of the Model Act retains the mandatory reporting obligation, however, not every state will adopt the Model Act, and those that do choose to implement a reporting requirement may not make it mandatory. This will invariably lead to uneven protection for vulnerable adults, which is apparent today in the emerging patchwork of inconsistent approaches among the states that have addressed this issue.

According to the 2013 Nationwide Survey of Mandatory Reporting Requirements for Elderly and/or Vulnerable Persons ("2013 Survey"),[12] while all states have passed statutes requiring certain professionals (i.e., attorneys, accountants, doctors, nurses and other health care workers, nursing homes and care providers) only twenty-one (21) states and the District of Columbia require financial institutions to report adhere to reporting requirements.[13] Three states - Iowa, Virginia and Washington - include "financial institutions" among the group of professionals who may report instances of financial abuse, but reporting is permissive, not mandatory. Finally, Washington State has a mandatory reporting requirement, but only in special circumstances, specifically, *if* the institution places a hold on a disbursement of funds due to suspected financial exploitation, it then *must* report the suspected abuse to authorities.[14]

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[9] NASAA's Model Act defines "qualified employee" 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.

[10] Subsection 2(3) of the Model Act defines "eligible adult" as "(a) a person sixty years of age or older; or (b) a person subject to [insert APS (Adult Protective Services) statute]."

[11] NASAA Model Act, Section 3, Governmental Disclosures.

[12] The 2013 Survey was published by New York District Attorney's Office and NAPSA Elder Financial Exploitation Advisory Board.

[13] Fifteen (15) states require "any person" or "any individual" to report suspected financial exploitation to the relevant authorities, including: Delaware, Florida, Indiana, Kentucky, Louisiana, Mississippi, New Hampshire, New Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Utah and Wyoming. The remaining six (6) states, Arizona, Arkansas, California, Georgia, Kansas and Maryland, and the District of Columbia, have specific references to "financial institutions" or persons having custody or control of the vulnerable adult's property. *See* 2013 Survey.

[14] Effective since June, 2010, Washington has a permissive statutory scheme that allows (but does not require) financial institutions to refuse a transaction requiring disbursal of funds in the account of a "vulnerable adult" if it reasonably believes financial exploitation occurred, was attempted, or is being attempted. Wash. Rev. Code Ann. § 74.34.215. For purposes of Chapter 74.34 only, "financial institution" is defined to also include broker-dealers and investment advisers. §74.34.020(8). *If* the financial institution chooses to halt the disbursal of funds under the statute, then it "shall" make a reasonable effort to notify all parties authorized to transact on the account and "shall" report the incident to adult protective services and local law enforcement. *Id.* at § 74.34.215(4). Absent a court order extending the time period, the ability for the institution to refuse to disburse funds expires after either 5 days or 10 days (if involving the sale or offer to sell a security). *Id.* at § 74.34.215(5), (6). So long as the refusal was made in good faith, the financial institution or its employee following the

Even among the states that include employees of financial institutions within the category of persons either required or permitted to report suspected abuse to authorities, the definition of a "financial institution" may not include a broker-dealer or investment adviser. For example, in California, since January 1, 2007, officers and employees of financial institutions have been mandatory reporters of suspected financial abuse of an elder or dependent adult, with "elder" defined simply as a California resident age 65 or older. Cal. Welf. & Inst. Code §§ 15610.27, 15630.1.[15] However, the California law is limited because, among other things, "financial institutions" are specifically defined to include national banks, savings and loans, state banks and trust companies whose deposits are not limited solely to funds held in a fiduciary capacity, and federal or state credit unions. *Id*. at § 15630.1(b). Thus, while the California provisions appear to give parallel required reporting requirements as the Model Act, they exclude broker-dealers and investment advisors not otherwise falling under the definition of "financial institutions."

Adding a mandatory reporting obligation to proposed FINRA Rule 2165 would provide uniform protection for a particularly vulnerable portion of the nation's investors. Such a requirement would prompt member firms to provide training to its registered persons on recognizing signs of potential financial exploitation.. As FINRA recognizes in Regulatory Notice 15-37, "a customer's registered representative may be the first person to detect potential financial exploitation." Simply put, brokers and investment advisers should have the same mandatory reporting requirements as other professionals.

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

As currently proposed, Rule 2165 would permit, but not require, member firms to place a temporary hold on disbursement of funds or securities from the account of a specified adult if the qualified person "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). Within two days after placing the hold, the firm must notify the person(s) authorized to transact business on the account and the "Trusted Contact Person" or, if the firm believes that person is involved in the financial exploitation, an immediate family member, and must also conduct an internal review. 2165(b)(2)(b). The temporary hold expires after 15 days, unless extended under certain defined circumstances. 2165 (b)(1)(C). The rule provides a safe harbor for those firms that choose to exercise discretion and temporarily hold disbursements. 2165.01.

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statutory scheme is immune from criminal, civil, or administrative liability. *Id.* at § 74.34.215(7). Thus, while Washington's law is permissive, once a firm elects to halt a disbursement it must notify all persons on the account in addition to APS and law enforcement.

[15] If an incident known or observed by the mandatory reporter reasonably appears to be financial abuse, or triggers reasonable suspicion of abuse, he or she must report "the known or suspected instance of financial abuse by telephone or through a confidential Internet reporting tool, as authorized pursuant to Section 15658, immediately, or as soon as practicably possible. If reported by telephone, a written report shall be sent, or an Internet report shall be made through the confidential Internet reporting tool established in Section 15658, within two working days to the local adult protective services agency or the local law enforcement agency." *Id.* at § 15630.1(d)(1). Reports of suspected financial abuse of the elder or dependent adult qualify as a "privileged publication or broadcast" under Cal. Civ. Code § 47(b). The mandated reporter is protected from civil and criminal liability with respect to the report. Cal. Welf. & Inst. Code § 15634. Interestingly, *nonmandated* reporters who report the abuse in the same manner as the mandated are also protected from liability, unless it can be proven that the report was knowingly false. Cal. Welf. & Inst. Code §§ 15631, 15634.

Importantly, should the member firm *choose* to exercise its discretion to place a temporary hold, the firm is then *required* to:

(1) Establish and maintain records related to the compliance with the rule, including evidence the request for disbursement, the finding of a reasonable belief of that financial exploitation has occurred, is occurring, has been attempted, or will be attempted, and records relating to the required notice and internal investigation. 2165 (b)(2)(C);

(2) Establish and maintain specific written supervisory procedures reasonably designed to achieve compliance with the rule, including, but not limited to, procedures related to the identification, escalation and reporting of matters involving the financial exploitation of Specified Adults, 2165.02; and

(3) Develop and document specific training policies or programs reasonably designed to ensure that registered persons comply with the requirements of this Rule. 2165.03.

The proposed rule would allow a broker-dealer to *ignore* evidence financial exploitation of a vulnerable adult because it is permissive. Indeed, as written, if a broker-dealer or registered person becomes aware of information sufficient to establish a reasonable belief of financial exploitation of a vulnerable adult, it does not have to place a temporary hold on the disbursement of funds or securities. Given the need for strong protection of the elderly investing population, the member firm should be *required* to place a temporary hold in order to prevent or mitigate the dissipation of its client's assets.

Moreover, in the context of a permissive rule, the requirements imposed on those firms that do exercise discretion under the rule create a disincentive for firms to provide this important protection to its clients. The easier, less expensive choice for firms would be to simply do nothing. Requiring *all* member firms to establish and maintain written supervisory procedures and training programs for its registered persons related to the identification, escalation and reporting of matters involving the financial exploitation of its elderly clients would promote the interest of investor protection.

We recognize that NASAA's proposed Model Act includes a similar provision allowing, but not requiring, broker-dealers and investment advisers to delay disbursement of assets when there is a reasonable belief of financial exploitation. Model Act § 7. PIABA submitted a comment letter urging NASAA to obligate firms to act, and hopes that the final version of the Model Act will require firms to do so. However, even if the Model Act would require firms to delay disbursements under circumstances of suspected financial abuse, States are not obligated to adopt the Model Act. By making Rule 2165 mandatory, FINRA would set a uniform standard of protection to investors nationwide.

C. The Model Act Does Not Institute a Penalty for Willfully Ignoring Evidence of Abuse

In order to enforce the obligations that should be created by Rule 2165, there should be inclusion of a penalty. Broker-dealers are already provided with a safe harbor if they act under the rule. 2165.01. Conversely, if a broker-dealer fails to comply with its affirmative obligations and willfully ignores information sufficient to establish a reasonable belief that financial exploitation has occurred, is occurring or is about to occur, the firm should be subject to a penalty. Should FINRA amend the rule to impose mandatory obligations in order to enhance investor protection, it should also make clear that a private right of action would exist.

D. Amending Definitions Section to Include Definition of "Disbursement" and Adding Associated Persons to the Definition of "Qualified Person"

PIABA also proposes that FINRA amend the definitions section in the rule in two important respects. First, the rule currently does not define the term "disbursement." The rule should include a definition to ensure that the temporary hold is only placed on the particular disbursement(s) that raises the reasonable suspicion of financial exploitation, rather than the entire account(s) of the Specified Adult. Many elderly clients pay their monthly bills and expenses from their brokerage accounts; some payments to providers are automatic. As such, it is particularly important to define "disbursement" in a manner that will limit the temporary hold only to individual suspicious attempted disbursements.

Second, the rule currently defines "qualified person" to include persons who serve in a supervisory, compliance or legal capacity relative to the account at issue. The definition should be expanded to include registered representatives because they are usually the associated persons at the broker-dealer with the most contact with investors and, therefore, are in the best position to first identify any suspicious behavior or conduct. At minimum, the rule should require that the registered representative *report* any suspicious behavior or conduct to his or her supervisor or other legal or compliance personnel at the firm.

E. Conclusion

In summary, PIABA asks that FINRA amend proposed Rule 2165 to address the foregoing serious shortcomings in its current form. PIABA thanks you for the opportunity to comment on this important topic.

Very truly yours,

Hugh D. Berkson,
PIABA President