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November 30, 2015

Via Email to pubcom@finra.org
Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 2006-1506

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

Dear Ms. Asquith:

The University of Miami School of Law Investor Rights Clinic ("the IRC") greatly appreciates the opportunity to comment on FINRA Regulatory Notice 15-37. The IRC is a University of Miami School of Law curricular 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. Under faculty supervision, law students provide legal assistance and advice to investors. Since the IRC opened in January 2012, it has assisted many 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.

Regulatory Notice 15-37 seeks comments on proposed rules to address the financial exploitation of seniors and other vulnerable adults. Regulatory Notice 15-37 proposes amendments to Rule 4512, Customer Account Information, which would require firms to obtain the name of and contact information for a trusted contact person for a customer's account. The IRC fully supports these proposed amendments because they will provide an outlet to immediately report activity in one's account to a trusted individual. This comment letter will address FINRA's new proposed rule, Rule 2165, Financial Exploitation of Specified Adults, which would permit "Qualified Persons"[1] of firms to place temporary holds on disbursements of funds or securities from the accounts of "Specified Adults"[2] where there is a reasonable belief of financial exploitation of those customers. This rule creates no obligation to place a hold on funds or securities where financial exploitation may be occurring, but it provides a safe harbor to firms who

[1] 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).

[2] A "Specified Adult" is defined as a "natural person age 65 and older." Rule 2165(a)(1)(A).

exercise discretion to place the temporary hold in such circumstances. The IRC believes that to more effectively protect elderly investors, proposed FINRA rule 2165 should be mandatory, not permissive. Furthermore, when a broker-dealer has a reasonable belief that financial exploitation has occurred, may be occurring, or is about to occur, it should be required to report the financial exploitation to the relevant authorities.

A. The Increasing Need to Protect Aging Population from Financial Exploitation

There is a growing need to protect elders from financial exploitation. An estimated one million elders lose over $2.9 billion each year due to financial abuse.[3] The 2009 MetLife Study found that "[t]he typical victim is between 70 and 89, white, female, frail, cognitively impaired, trusting, and often lonely or isolated."[4] Over 40% of the perpetrators of the abuse were family, spouses, and caregivers.[5] This problem is significantly larger than reported[6] and it's growing by virtue of the fact that the U.S. population is aging. Persons aged 65 and older represent the fastest growing segment of the U.S. population.[7] Approximately 10,000 people will turn 65 every day for the next 15 years.[8]

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[3] MetLife Mature Market Institute ("Metlife"), *Broken Trust: Elders, Family & Finances*, (March 2009), Joint study with National Committee for the Prevention of Elder Abuse ("NCPEA") and the Center for Gerontology at Virginia Polytechnic Institute and State University (hereinafter, "2009 MetLife Study"). In 2010, MetLife conducted a follow-up joint survey that found a 12% increase in the amount of financial losses reported, to $2.9 billion per year. *The MetLife Study of Elder Financial Abuse: Crimse of Occasion, Desperation and Predation Against America's Elders* (June 2011), at 2.

[4] *Id.* at 8.

[5] *Id.* at 12.

[6] The 2009 MetLife Study found that elder financial abuse, like elder abuse generally, is significantly underreported for a variety of reasons, including, embarrassment, fear of interference from family or government in their personal lives, lack of realization that they have been victimized, fear of additional harm from the perpetrator, and a belief that financial abuse is a consequence of "doing business" or taking risks, among other things. *Id.* at 21.

[7] Carrie A. Werner, *The Older Population: 2010*, U.S. Census Bureau, P1 U.S. Government Printing Office, Washington DC (2010). Between 2000 and 2010, the population of persons aged 65 and over grew at over 15% faster than the 9.7% growth of the overall U.S. population. *Id.*

[8] SEC Press Release: SEC Staff and FINRA Issue Report on National Senior Investor Initiative (April 15, 2015). *See also* SEC Office of Compliance Inspections and Examinations and FINRA Report on National Senior Investor Initiative (April 15, 2015) (hereinafter, "SEC/FINRA National Senior Investor Report"), at 3 (citing Administration on Aging Administration for Community Living, U.S. Department of Health and Human Services, A Profile of Older Americans: 2012, page 1 (2012), *available at*: http://www.aoa.gov/Aging_Statistics/Profile/2012/docs/2012profile.pdf)

FINRA has long recognized the important role broker-dealers can play in helping curb financial abuse of the elderly and vulnerable adults. In 2007, FINRA issued Regulatory Notice 07-43, which outlined several significant ways financial firms can play a role in curbing elderly financial abuse.[9] A joint report issued by the SEC and FINRA in 2008[10] summarized information voluntarily shared by firms in connection with senior-focused supervision and compliance reviews, among other things, and the 2010 Addendum to the Report[11] outlined practices firms had put in place on how to handle customers suffering from diminished capacity and potential issues of financial exploitation. Most recently, the National Senior Investor Initiative report issued this year by the SEC and FINRA reminded the industry of its critical role in curbing financial abuse and highlighted the best, or "notable practices," employed at some of the firms which could help identify and address issues relating to senior investors.[12] FINRA also launched this year its Securities Helpline for Seniors, through which it offers seniors an opportunity to call for assistance regarding their brokerage accounts. In Regulatory Notice 15-37, FINRA in fact credits the Senior Hotline as having "highlighted issues" relating to the financial exploitation of seniors and other vulnerable adults, and the importance of the firm's role in curbing that abuse. These issues are precisely why a firm should be *required* to act if a Qualified Person reasonably believes that financial exploitation has occurred, is occurring, has been attempted, or will be attempted, specifically, by reporting that conduct to the relevant authorities and placing a temporary hold on the suspected transaction.

B. FINRA Rule 2165 Should Mandate Firms to Report Financial Exploitation and Abuse to Relevant Authorities

Increasing mental and physical ailments associated with aging can impede an elderly investor's ability to handle his/her financial affairs.[13] Registered persons are in a 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

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[9] Regulatory Notice 07-43, *Senior Investors: FINRA Reminds Firms of Their Obligations to Senior Investors and Highlights Industry Practices to Serve these Customers* (September 2007). Although RN 07-43 largely focused on sales practice and communication issues impacting seniors, it urged firms to review and enhance its policies and procedures "in light of the special issues that are common to many senior investors."

[10] "Protecting Senior Investors: Compliance, Supervisory and Other Practices Used by Financial Services Firms in Serving Senior Investors," by SEC's Office of Compliance Inspections and Examinations, NASAA and FINRA (September 22, 2008) ("2008 Report"), *available at:* http://www.sec.gov/spotlight/seniors/seniorspracticesreport092208.pdf

[11] *Available at:* https://www.sec.gov/spotlight/seniors/seniorspracticesreport081210.pdf

[12] SEC/FINRA National Senior Investor Report, at 3-5, 9, 11, 15, 17, 20, 23, 26 and 31.

[13] Lawrence A. Frolik, *Protecting Our Aging Retirees: Converting 401(k) Accounts into Federally Guaranteed Lifetime Annuities,* 47 San Diego L. Rev. 277, 292-94.

abuse.[14] Financial advisors frequently become aware of suspicious activity before the investor's family or friends.[15] FINRA also acknowledges in Regulatory Notice 15-37 that "a customer's registered representative may be the first person to detect potential financial exploitation." As such, when there are reasonable grounds to believe a client is being financially exploited, the member firm should be required to report potential exploitation to proper authorities.

In fact, many states already require financial institutions to report suspected financial abuse of the elderly. According to the 2013 Nationwide Survey of Mandatory Reporting Requirements for Elderly and/or Vulnerable Persons ("2013 Survey"),[16] all states have passed statutes requiring certain professionals, including, but not limited to, attorneys, accountants, doctors, nurses and other health care workers, nursing homes, and care providers. Brokers and investment advisers should have no less than the same mandatory reporting requirements as other professionals.

The 2013 Survey also makes plain the need for FINRA to level the playing field and *require* the same basic protection for *all* investors. To date, only twenty-one (21) states and the District of Columbia require financial institutions to adhere to reporting requirements.[17] Three states, Iowa, Virginia, and Washington, include "financial institutions" among the group of professionals who may report instances of financial abuse, but reporting is voluntary and not mandatory.[18] Moreover, 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

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[14] *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.

[15] *Id.*

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

[17] 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.

[18] *Id.* Effective since June 2010, 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, only then it *must* report the suspected abuse to authorities. Wash. Rev. Code Ann. § 74.34.215.

California, since January 1, 2007, officers and employees of financial institutions are required to report suspected financial abuse of an elder or dependent adult, with "elder" defined simply as a California resident age 65 or older.[19] 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.[20]

Adding a mandatory reporting obligation to the proposed FINRA Rule 2165 would provide uniform protection for the most vulnerable of the nation's investors. Such a requirement would prompt member firms to provide training to their registered persons on recognizing signs of potential financial abuse or exploitation, which should be encouraged.

C. When There is Reasonable Suspicion of Financial Exploitation or Abuse, a Firm Should Have an Obligation to Place a Temporary Hold on Disbursement of Funds or Securities

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. Rule 2165(b)(2)(b). The temporary hold expires after 15 days, unless extended under certain defined circumstances. Rule 2165 (b)(1)(C). The rule provides a safe harbor for those firms that choose to exercise discretion and temporarily hold disbursements. Rule 2165.01.

The proposed rule would allow a broker-dealer to *ignore* evidence of financial exploitation of a vulnerable adult because the rule permits, rather than mandating the reporting. Indeed, as written, if a broker-dealer or a 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.[21]

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[19] Cal. Welf. & Inst. Code §§ 15610.27, 15630.1.

[20] *Id.* at § 15630.1(b).

[21] While the industry may object to a mandatory requirement on the grounds that it will expose members to civil liability, the proposed rule provides a safe harbor to firms that exercise discretion and implement the procedures outlined in the rule. With respect to civil liability for a

Moreover, in the context of a permissive rule, the procedures that firms must implement and follow create a strong disincentive for firms to provide this important protection to their clients. Specifically, if a firm chooses to exercise its discretion to place a temporary hold on funds, the firm is required to: (1) establish and maintain specific written supervisory procedures reasonably designed to achieve compliance with the rule;[22] (2) develop and document specific training policies or programs reasonably designed to ensure that registered persons comply with the requirements of this Rule;[23] and (3) establish and maintain records related to the compliance with the rule.[24] The easier and 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 and ensure protection for seniors who are being financially exploited. The IRC also believes that mandating Rule 2165 will provide a strong deterrent against misconduct, preventing harm before it occurs in many cases. Thus, the implementation of Rule 2165, with the modification that the actions be mandatory and not permissive, and that the firm report suspected abuse to the relevant authorities, would benefit the elderly community and protect investors.

D. Conclusion

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

Respectfully submitted,

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firm's *failure* to act, the rule sets forth an objectively reasonable standard that all firms should be required to meet.

[22] FINRA Rule 2165.02.

[23] FINRA Rule 2165.03.

[24] FINRA Rule 2165 (b)(2)(C).