

October 8, 2019

VIA EMAIL - pubcom@finra.orgJennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506**RE: Comments Regarding FINRA Regulatory Notice 19-27**

Dear Ms. Piorko Mitchell:

Fordham Law's Securities Arbitration Clinic (the "Clinic") appreciates the opportunity to provide feedback on the request for comment of the Financial Industry Regulatory Authority ("FINRA") for Regulatory Notice 19-27 on Rules and Issues Relating to Senior Investors (the "Notice"). Students in the Clinic, under the close supervision of a professor, provide legal representation to clients with limited resources for securities disputes. The Clinic is part of Lincoln Square Legal Services, Inc., a not-for-profit legal services organization.¹ Because of our commitment to protecting investors, the Clinic has a strong interest in commenting on this Notice. We respectfully submit the following comments and recommendations for your consideration.

I. FINRA Should Amend the Sanction Guidelines to add as a Principal Consideration the Fact that a Victimized Customer is a "Specified Adult."

FINRA asks in the Notice whether the Sanction Guidelines should be amended "to add as a principal consideration the fact that a victimized customer is a 'specified adult' (i.e., a person 65 or older or a person 18 or older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests)?"²

The Sanction Guidelines provide general principles and specific recommendations for when rule violations occur.³ While the Sanction Guidelines are not absolute and allow for

¹ For more information on the Clinic, please see https://www.fordham.edu/info/23935/securities_litigation_and_arbitration.

² FINRA, Reg. Notice 19-27 9 (2019), <https://www.finra.org/sites/default/files/2019-09/Regulatory-Notice-19-27.pdf> [hereinafter "Reg. Notice 19-27"].

³ Reg. Notice 19-27, supra note 2, at 7.

flexibility in how sanctions are imposed, Adjudicators are encouraged to “look to the Guidelines for analogous violations” not proscribed.⁴

Although the Notice points out that “undue influence” and “sophistication” are considerations to be taken into account when applying sanctions,⁵ we believe this does not adequately consider all the factors and circumstances involved in cases relating to a “specified adult.” With many senior investors, their age is a factor that prevents them from recouping their losses when their broker makes unsuitable investments. By placing their retirement savings in unsuitably risky investments, our elderly clients have suffered losses they can never recoup because they no longer receive a salary, absent winning an award at arbitration. We believe the Sanction Guidelines would benefit from the additional consideration of the fact that a victimized customer is a "specified adult" because it encompasses factors beyond what may be considered under "undue influence" or "sophistication."

Even if not included as a principal consideration, we suggest FINRA provide guidance on how the Sanction Guidelines should be applied in cases involving "specified adults." The current Guidelines are broad, allowing for Adjudicators wide latitude to decide the sanction.⁶ While this allows for many factors relating to "specified adults" to be considered, some Adjudicators may not realize or understand all of the considerations involved with these investors. Guidance from FINRA on "specified adults" will aid Adjudicators and member firms in understanding how the sanctions may apply in these circumstances.

II. FINRA Should Require Additional Disclosures and Heightened Supervision Over Senior Investors that are Placed in Investments Such as Annuities.

In the Notice, FINRA asks if it should "require additional disclosure or heightened supervision for any particular product or investment strategy that is marketed to senior investors?"⁷

FINRA acknowledges that heightened supervision is necessary in some cases, such as when brokers or firms have a prior history of misconduct.⁸ Although FINRA has rules and

⁴ FINRA, Sanction Guidelines 1 (Mar. 2019), https://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf [hereinafter “Sanction Guidelines”].

⁵ Reg. Notice 19-27, *supra* note 2, at 8.

⁶ Sanction Guidelines, *supra* note 4, at 1 (discussing the flexibility of the sanction guidelines).

⁷ Reg. Notice 19-27, *supra* note 2, at 10.

⁸ See generally FINRA, Reg. Notice 19-17 (2019), <https://www.finra.org/rules-guidance/notices/19-17> (proposing Rule 4111 imposing obligations on firms with history of misconduct); FINRA, Reg. Notice 18-15 (2018), https://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-18-

guidance relating to heightened supervision for these high-risk firms and brokers, there is currently not a similar rule regarding supervision of accounts held by senior investors.

As a result, senior investors are at risk for being placed in unsuitable investments by brokers without proper supervision from firms. For example, annuities are often targeted towards senior investors.⁹ Annuities come in various¹⁰ and complex¹¹ structures, and in many cases are not suitable for inexperienced investors like our clients.¹² Annuities are ripe for abuse because their terms are often confusing. FINRA and the SEC have acknowledged that annuities may not be suitable for some senior investors,¹³ including FINRA's rule pertaining to the recommendation of annuities.¹⁴ Despite this, we see our clients often being placed in annuities that are unsuitable for their needs and goals.

We suggest FINRA strengthen its current efforts by having heightened supervision for investments frequently sold to senior investors such as annuities. Similar to how FINRA requires heightened supervision of brokers and firms with histories of misconduct, FINRA could require firms to establish standards for reviewing and supervising accounts of senior investors invested in annuities.

III. FINRA Should Conduct Additional Research on the Types of Investments that are the Subject of Suits Brought by Senior Investors Against Brokers and Firm.

In the Notice, FINRA asks "[w]hat additional guidance, tools or resources would be

[15_1.pdf](#) (providing guidance on imposing heightened supervisory procedures for associated persons with a history of misconduct).

⁹ See, e.g., Jeff Sommer, [The Rolling Stones Know What You Need: An Annuity](#), N.Y. Times (July 1, 2019), <https://www.nytimes.com/2019/07/01/business/rolling-stones-social-security-retirement.html> (discussing how the Rolling Stones Tour was sponsored by a trade association that advertised annuities).

¹⁰ [Annuities](#), Investor.gov, <https://www.investor.gov/introduction-investing/basics/investment-products/annuities>.

¹¹ SEC, [Fast Answers: Annuities](#), <https://www.sec.gov/fast-answers/answersannuityhtm.html> (last modified Apr. 6, 2011) [hereinafter "Fast Answers"].

¹² Penelope Wang, [Why Indexed Annuities May Promise More Than They Deliver](#), Consumer Rep. (Sept. 2, 2019), <https://www.consumerreports.org/retirement-planning/why-indexed-annuities-may-promise-more-than-they-deliver/>.

¹³ [Fast Answers](#), *supra* note 11; FINRA, Reg. Notice 07-43 3-4 (2007), <https://www.finra.org/rules-guidance/notices/07-43> ("[C]ertain products or strategies pose risks that may be unsuitable for many seniors, because of time horizon considerations, liquidity, volatility or inflation risk. . . . For example, FINRA has repeatedly stated that variable annuities are generally considered to be long-term investments and are therefore typically not suitable for investors who have short-term investment horizons."); [Annuities](#), FINRA.org, <https://www.finra.org/investors/learn-to-invest/types-investments/annuities>.

¹⁴ FINRA, Rule 2330 (2014), <https://www.finra.org/rules-guidance/rulebooks/finra-rules/2330>.

helpful to firms or the investing public to address suspected financial exploitation and other circumstances of financial vulnerability for senior investors? Are there areas where FINRA or the FINRA Investor Education Foundation should conduct additional research or publish additional materials to promote greater awareness and education?"¹⁵

FINRA provides detailed and helpful information about its arbitration process on its website.¹⁶ This information provides insight into the claims brought in arbitration and mediation, the settlements made, and the number of cases outstanding.¹⁷ To the extent they currently do not already do so, FINRA could expand on this analysis and determine which cases are brought by senior investors and for what reasons. This information can be used by FINRA and the investing public to learn about trends in how brokers are managing senior investors' funds. By doing this, FINRA can better develop rules and guidance on how to prevent these abuses.

Our clients in the Clinic come from a wide range of ages, races, ethnicities, and socioeconomic backgrounds. Many of them are immigrants. Their brokers have invested them in a wide range of products, including stocks of high-risk companies, below-investment grade bonds, annuities, and Real Estate Investment Trusts. But many of their cases overlap in terms of how their brokers take advantage of them and the high level of trust they place in their brokers and firms. FINRA has recognized that investors like our clients rely heavily on firms and their brokers to protect them.¹⁸ Accordingly, FINRA should review the information it already collects to gain a better understanding of the problems at hand in order to better protect senior investors.

IV. FINRA Should Consider Making Changes to Account Opening Documents and Create a Rebuttable Presumption for Brokerage Firms.

In the Notice, FINRA asks if there are "other approaches, policies, rules, programs or partnerships not discussed herein that are within FINRA's jurisdiction and mandate that would further benefit senior investors?"¹⁹

¹⁵ Reg. Notice 19-27, *supra* note 2, at 10.

¹⁶ *Dispute Resolution Statistics*, FINRA.org, <https://www.finra.org/arbitration-mediation/dispute-resolution-statistics>.

¹⁷ *Id.*

¹⁸ Mary L. Schapiro, Chief Executive Officer, FINRA, Remarks From SEC's Third Annual Senior Summit (Sept. 22, 2008), <https://www.finra.org/media-center/speeches-testimony/remarks-secs-third-annual-senior-summit> ("Seniors need regulators to set and enforce high standards. But they rely even more on the firms we regulate, and the financial professionals that give them advice, to embody those standards of trust and excellence.").

¹⁹ Reg. Notice 19-27, *supra* note 2, at 10.

In April 2019, our Clinic attended the SEC's Investor Advocacy Summit in Washington, D.C.²⁰ There, we discussed our work and common challenges that our clients face. Specifically, we discussed how our client's brokers typically fill out the account opening forms on behalf of our clients, with our clients trusting that the information they provide is accurately reflected on the forms. Because these forms set the parameters for permissible trading and are used as a tool by supervisors to ensure investments are suitable, it is crucial this information is accurate. Unscrupulous brokers, however, complete these forms with false information or information they never discussed with their clients. Moreover, brokers typically do not explain the importance of the information required in an account opening form, nor do they provide our clients with copies of the form. Finally, our clients are typically not provided an opportunity to review the documents before signing.

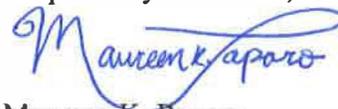
We suggested at the Summit that brokerage firms should create boxes for customers to initial next to each important question to confirm that they read and understood what they were signing on their account opening form. We believe this will force brokers to allow their clients time to read their account opening forms and to ensure the information is accurate.

While we do not believe firms should be required to do this, we suggested incentivizing firms to institute this change to their account opening forms by creating a rebuttable presumption in their favor that the customer's information on the form is accurate and was read if the customer initialed the information. We believe this rebuttable presumption will promote better communication and protect senior investors from financial exploitation.

Conclusion

We once again thank FINRA for the opportunity to comment on this Notice.

Respectfully submitted,



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Legal Intern

Lincoln Square Legal Services, Inc.

²⁰ Securities Arbitration Clinic Participates in Investor Advocacy Summit in Washington, D.C., Fordham L. News (Apr. 30, 2019), <https://news.law.fordham.edu/blog/2019/04/30/securities-arbitration-clinic-participates-in-investor-advocacy-summit-in-washington-d-c/>.