



Helping to build sustainable communities across Nevada to stabilize and improve the lives of individuals & families



October 8, 2019

By email to: pubcom@finra.org

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: FINRA Regulatory Notice 19-27
Rules and Issues Relating to Senior Investors

Dear Vice President Mitchell:

Opportunity Alliance Nevada writes to comment on the Financial Industry Regulatory Authority's (FINRA) notice soliciting comments in connection with its retrospective review of the rules and regulations protecting senior investors. Opportunity Alliance Nevada is a non-profit organization bringing together resources and people from diverse economic backgrounds to investigate and to understand the barriers faced by struggling low- to moderate-income Nevadans and to provide pathways to self-sufficiency. Opportunity Alliance Nevada provides training, financial coaching, mentorship, advocacy, partnerships, and community collaboration to stabilize and improve the lives of individuals and families. We are grateful to FINRA for the opportunity to provide comments here.

We commend FINRA for its rules protecting senior investors, but urge FINRA to extend Rule 2165's safe harbor protection to scenarios where a member firm has a reasonable belief that an investor has an impairment limiting his or her ability to protect him or herself—regardless of whether there is evidence of exploitation by a third party.

- I. **Request for Comment No. 2.** *Should Rule 2165's safe harbor be extended to apply where there is a reasonable belief that the customer has an impairment that renders the individual unable to protect his or her own interests (e.g., a cognitive impairment or diminished capacity), irrespective of whether there is evidence that the customer may be the victim of financial exploitation by a third party? What burdens would be placed on member firms and their registered persons if the safe harbor were extended in this way?*

A. FINRA Should Extend Rule 2165's Safe Harbor to Protect Individuals with Diminished Capacity Regardless of Suspicion of Third-Party Financial Exploitation

1. Background on Senior Investors

Seniors over the age of 65 are a continually growing population that are often at a unique risk for financial exploitation.¹ Current predictions estimate that the population of individuals age 65 and older in the United States will grow from 55 million to 88 million by 2050.² This population is also at the greatest risk of Alzheimer's and other dementias.³ Of the estimated 5.8 million individuals living with Alzheimer's dementia in the United States, 97% are 65 or older.⁴ And although increased levels of education and other factors have reduced the risk of dementia in the United States over the last twenty-five years, unfortunately, the total number of individuals affected by dementia is projected to continually increase dramatically in the coming years.⁵

Individuals age 65 and older without dementia, may still have reduced cognitive function impeding their ability to make sound financial decisions.⁶ In fact, one study indicated that around half of individuals in their 80s suffer from either dementia or other cognitive impairments.⁷ The risk of exploitation and other related financial consequences are exacerbated by recent trends away from defined benefit plans to defined contribution retirement plans and have placed a greater responsibility on the senior population to manage their own retirement funds.⁸ These risk factors, combined with a decline in financial literacy by age⁹ creates a group uniquely positioned to be financially exploited

¹ See CONSUMER FIN. PROTECT. BUREAU, SUSPICIOUS ACTIVITY REPORTS ON ELDER FINANCIAL EXPLOITATION: ISSUES AND TRENDS 11 (2019) (finding that the number of suspicious activity reports filed on elder financial abuse quadrupled from 2013 to 2017); NAOMI KARP & RYAN WILSON, PROTECTING OLDER INVESTORS: THE CHALLENGE OF DIMINISHED CAPACITY, AARP PUB. POLICY INST. 1 (2011), https://www.aarp.org/content/dam/aarp/research/public_policy_institute/cons_prot/2011/rr2011-04.pdf (finding in 2011 that seniors lost an estimated \$2.9 billion annually due to financial exploitation).

² 2019 Alzheimer's Disease Facts and Figures, ALZHEIMER'S ASS'N, 15 ALZHEIMER'S & DEMENTIA 321, 330 (2019) [hereinafter 2019 Alzheimer's Report]; see *Protecting Seniors from Financial Exploitation*, FINRA (Apr. 25, 2018), <https://www.finra.org/investors/insights/senior-financial-exploitation> (finding that over the next twelve years that an average of 100,000 Americans will turn 65 daily).

³ 2019 ALZHEIMER'S REPORT, *supra* note 2, at 330.

⁴ *Id.*

⁵ *Id.* at 335; Mark Mather et al., *Fact Sheet: Aging in the United States*, POPULATION REFERENCE BUREAU (Jul. 15, 2019), <https://www.prb.org/aging-unitedstates-fact-sheet/> (“[T]he number of Americans living with Alzheimer's disease . . . could more than double by 2050.”).

⁶ Sumit Agarwal et al., *The Age of Reason: Financial Decisions Over the Life Cycle and Implications for Regulation*, in BROOKINGS PAPERS ON ECON. ACTIVITY: FALL 2009 51, 57 (David H. Romer & Justin Wolfers eds., 2010).

⁷ *Id.*

⁸ Stephen Deane, *How the SEC Works to Protect Senior Investors*, U.S. SEC: OFF. INVES. ADVOC., 1, 9 (2019), <https://www.sec.gov/files/how-the-sec-works-to-protect-senior-investors.pdf>.

⁹ See Michael S. Finke et al., *Old Age and the Decline in Financial Literacy*, 63 MANAGEMENT SCIENCE 213, 225 (2017) (finding “a consistent linear decline in average financial literacy score of about one percentage point per year among respondents over age 60.”).

by third parties or to lack the necessary cognitive ability to make sound financial decisions.¹⁰

2. How Rule 2165 Leaves Investors Vulnerable

Currently, under Rule 2165, a member firm may place a temporary hold on the disbursement of funds or securities from a specified adult's account when that member firm reasonably believes that there is a risk of financial exploitation.¹¹ The rule includes both those individuals age 65 or older, or an individual who cannot protect his or her own interests because of a mental or physical impairment.¹²

While this rule does not impose an obligation on member firms, it provides protection for that member firm to place a temporary hold on disbursements from the account to investigate the potential exploitation of the specified adult.¹³ This rule however, only applies in cases of financial exploitation.¹⁴ Although financial exploitation remains a significant problem for senior investors, its current definition under Rule 2165 leaves investors with diminished capacity vulnerable. This rule limits "financial exploitation" to:

(A) the wrongful or unauthorized taking, withholding, appropriation, or use of a specified adult's funds or securities; or (B) any act or omission taken by a person, including through the use of a power of attorney, guardianship, or any other authority, regarding a 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.¹⁵

Thus, even if a broker has a reasonable belief that an investor has a mental or physical impairment either rendering that investor incapable of protecting his or her interests or causing the investor to dissipate assets, unless that broker believes that a third party is or will financially exploit the investor, the broker is potentially in violation of FINRA Rules 2010,¹⁶ 2150,¹⁷ and 11870.¹⁸

¹⁰ See Eric Widera et al., *Finances in the Older Patient with Cognitive Impairment*, 305 JAMA 698, 699 (2011) ("Financial capacity comprises a range of conceptual, pragmatic/procedural, and judgmental skills acquired over a lifetime, and is highly vulnerable to the cognitive changes accompanying conditions such as mild cognitive impairment . . .").

¹¹ See FINRA Rule 2165(b).

¹² FINRA Rule 2165(a)(1).

¹³ See FINRA Rule 2165. This rule does not extend the safe harbor for securities transactions and only applies to disbursements from the account. See *Frequently Asked Questions Regarding FINRA Rules Relating to Financial Exploitation of Senior Investors*, FINRA, <https://www.finra.org/rules-guidance/guidance/faqs/frequently-asked-questions-regarding-finra-rules-relating-financial-exploitation-seniors> (last visited Sept. 27, 2019).

¹⁴ See FINRA Rule 2165.

¹⁵ FINRA Rule 2165.

¹⁶ FINRA Rule 2165; see John Curley, *FINRA Rule 2010: A Short Rule With a Long Reach*, THINKADVISOR (Aug. 31, 2018), <https://www.thinkadvisor.com/2018/08/31/finra-rule-2010-a-short-rule-with-a-long-reach/> (discussing Rule 2010's broad applicability).

¹⁷ FINRA Rule 2150.

¹⁸ FINRA Rule 11870.

FINRA considered this exact scenario when it first introduced Rule 2165 in 2017.¹⁹ Several commenters noted that Rule 2165's limitation to third-party financial exploitation could limit the rule's effectiveness at protecting investors.²⁰ In response, FINRA explained that the rule still protects investors in two ways.²¹ First, if a member suspects that an investor could be suffering from Alzheimer's or dementia, the member could reach out to the investor's trusted contact person under the rule.²² Second, it explained that Section (a)(1)(B) already includes individuals with diminished capacity in its scope.²³ While these sections provide investors coverage under the safe harbor in cases of financial exploitation, these sections fail to address the issue of whether a member firm can use the safe harbor rule to prevent disbursements as a result of an investor's diminished capacity.

Although we appreciate FINRA's inclusion of mental and physical capability in Rule 2165, under the current framework, investors are left potentially exposed to significant risk. Because "[f]inancial capacity is one of the first abilities to decline as cognitive impairment encroaches,"²⁴ it is vitally important that the rules aimed at protecting investors provide member firms with the ability to adequately investigate whether an individual has the capacity to protect his or her own interests.

While the rule provides necessary protection for those at risk of financial exploitation, it fails to protect senior investors who, because of their diminished capacity, may dissipate needed assets. For example, Rule 2165 would not protect a firm or the investor if an investor, because of her diminished decision-making capacity, asks her firm to sell her shares of a stock and disburse the proceeds out of her account, even if that sale is plainly detrimental to the investor, unless it reasonably suspects that the request is because of third-party financial exploitation.²⁵

3. Recommendation

FINRA should add a diminished capacity provision to Section (b)(1)(A) to allow a member firm to place a temporary hold on an account if the member reasonably believes that

¹⁹ Letter from Jeanette Wingler, FINRA Associate General Counsel, to Brent J. Fields, Secretary, U.S. SEC (Jan. 19, 2017) [hereinafter FINRA Letter], https://www.finra.org/sites/default/files/rule_filing_file/SR-FINRA-2016-039-response-to-comments.pdf.

²⁰ See, e.g., Letter from Carrie L. Chelko, Chief Counsel, Lincoln Fin. Network, to Marcia E. Asquith, Senior Vice President and Corp. Sec'y, FINRA, 4–5 (Nov. 30, 2015), https://www.finra.org/sites/default/files/15-37_LFN_comment.pdf; Letter from Robert Egge, Exec. Vice President Gov't Affairs, Alzheimer's Ass'n, to Marcia E. Asquith, Senior Vice President and Corp. Sec'y, FINRA, 2 (Nov. 30, 2015), https://www.finra.org/sites/default/files/notice_comment_file_ref/15-37_Egge_comment.pdf.

²¹ FINRA Letter, *supra* note 19, at 6.

²² *Id.*

²³ *Id.*

²⁴ KARP & WILSON, *supra* note 1, at 1; accord Catherine Schnaubelt, *Understanding the Financial Risks of Diminished Capacity*, FORBES (Jun. 20, 2018), <https://www.forbes.com/sites/catherineschnaubelt/2018/06/20/understanding-the-financial-risks-of-diminished-capacity/#52c87eeb5285>.

²⁵ See KARP & WILSON, *supra* note 1, at 1.

financial exploitation has or will occur, or if the member reasonably believes that an investor lacks the capacity to make the decision regarding the transaction or disbursement. Expanding the scope of the rule would provide protection for a member firm to investigate whether a disbursement of securities or funds was a result of the investor's diminished capacity. This expansion would not over-burden member firms but rather would protect both investors and firms, and incentivize firms to apply the rule without fear of violating other FINRA rules.

With expanded coverage, firms will actually stop more cases of exploitation. If a firm reasonably suspects that an investor is suffering from diminished capacity and observes seemingly irrational behavior, the firm's hold gives it the time to investigate the cause of the unusual behavior. This means that it may discover exploitation that it would not have under the current rule.

B. Conclusion

Increased rates of Alzheimer's, dementia, and other forms of diminished capacity place senior investors at a significant risk of not only financial exploitation by third parties, but also that their own diminished capacity could harm them. We commend FINRA for its rules protecting senior investors but urge FINRA to expand that protection even in the absence of financial exploitation.

Respectfully submitted,²⁶

/s/ Nancy Brown

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Opportunity Alliance Nevada

/s/ Dian VanderWell

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²⁶ This letter was prepared on behalf of Opportunity Alliance Nevada by student attorneys Christian P. Ogata, Alisa A. McAfee, and Meredith L. Hall under the supervision of Benjamin P. Edwards, at the Investor Protection Clinic at the William S. Boyd School of Law, University of Nevada, Las Vegas.