



November 15, 2019

Submitted via e-mail: pubcom@finra.org

FINRA
1735 K Street, NW
Washington, DC 20006

Re: Regulatory Notice 19-27; Supplemental Letter on Transaction Holds

To Whom it May Concern:

Thank you for the opportunity to provide additional feedback on Regulatory Notice 19-27, specifically the potential expansion of FINRA Rule 2165 to cover suspicious transactions in addition to suspicious disbursements. SIFMA and its member firms strongly believe that protecting customers from suspicious transactions would be a vital, important and natural expansion of Rule 2165. FINRA itself recognized that an expansion to suspicious transactions could be the natural path of Rule 2165 as early as the organization's response to comments on Regulatory Notice 15-37,¹ when FINRA's highly successful rule was initially proposed. After a full year of working with the rules in question, the time has come to move forward with such an expansion.

Background

In our October 8 letter responding to this Regulatory Notice more broadly, SIFMA briefly outlined the fiscal losses that senior investors face as a result of financial exploitation, but the danger that financial exploitation poses to senior investors is far greater than just the fiscal impact. The World Bank has even dubbed financial exploitation an act of financial violence.² In 2015, the FINRA Investor Education Foundation published a report on "Non-Traditional Costs of Financial Fraud," which found that fraud led to increased severe stress, anxiety, difficulty sleeping, depression and other health problems.³ Recent research took this premise even further, finding that victims of financial exploitation⁴ had one of the highest mortality rates among abuse victims within 5 years.⁵ Victims of financial exploitation are dying at a faster rate than victims of physical abuse.

For this reason, many states have specifically criminalized the financial exploitation of seniors and/or vulnerable adults. In fact, roughly 36 states have laws specifically identifying such abuse as a crime. Even without specific statutes, the remaining states prosecute financial exploitation under other sections of their criminal code (theft, abuse, etc.).⁶ These laws make no distinction between disbursements and transactions. This means that the actions covered in the Rule 2165 definition of "financial exploitation" are considered criminal activity by many states.

Stopping financial exploitation in all its forms, where possible, should be FINRA's goal. Expanding Rule 2165 to include transactions provides the customers of FINRA's member firms with stronger, more robust protections from potentially life-threatening dangers.

¹ SR-FINRA [2016-39](#), pg. 40.

² Price, Thomas; King, Patricia; Dillard, Rebecca; Bulot, James, "Elder Financial Exploitation: Implications for Future Policy and Research in Elder [Mistreatment](#)," 2011.

³ FINRA Investor Education Foundation and Applied Research & Consulting, "Non-Traditional Costs of Financial Fraud: Report of Survey [Findings](#)," March 2015.

⁴ Caregiver neglect had a slightly higher but not statistically significant mortality rate.

⁵ Burnett, Jason, "Elder Financial Exploitation: More than Just Financial [Loss](#)," February 4, 2019.

⁶ Hansen, Kevin, "Protecting Vulnerable Adults from Suspected Financial [Exploitation](#)," February 7, 2018.

Broadening Protections to Suspicious Transactions

While the inclusion of transaction protections appears to enjoy broad support, some concerns that we have seen raised are: adults, absent diminished capacity, should be able to do whatever they want with their money; delaying a transaction could result in market movement to the detriment of the customer; transaction holds would not conform with the North American Securities Administrators Association's ("NASAA") model act on this issue; and delaying suspicious transactions could give rise to certain best execution issues.

I. Protecting Vulnerable Adults and Senior Investors

Rule 2165 currently 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. In finalizing this rule, FINRA made the determination that it was important for its members to be able to safeguard their clients from financial exploitation. The industry wholeheartedly agreed (and had been advocating for such a rule). The states also agreed – in fact, roughly half of the states in the country have a law comparable to FINRA Rule 2165. However, 2165 only protected customers from exploitative disbursements, where exploitative transactions could be just as harmful (e.g., taxes or penalties as a result of certain sales or the liquidation of long-held annuities, the proceeds of which the power of attorney uses to start day trading). As stated in our previous letter, expanding the rule to include transactions will provide fuller protections against harm.

To put this another way, FINRA is not proposing to change the definition of “financial exploitation.” This change would merely expand the umbrella of protections offered by the industry to protect their clients against the same bad acts from which the industry is already trying to protect them. To differentiate between transaction and disbursement protections is to openly recognize that someone is likely committing a bad act, but then only allowing member firms to protect their client if the perpetrator commits that act in a certain way.

II. Transaction Protections are Already Common and Supported by those with the most Expertise

Even the National Adult Protective Services Association, the premiere organization whose members work daily with older and vulnerable adults, has submitted a letter in support of expanding the rule to cover transactions.⁷

NASAA's October 8 letter on this issue references many states that have enacted laws based on NASAA's model proposal.⁸ While the NASAA model, as promulgated in 2015, only covers suspicious disbursements, 11 of the states enacting “Report & Hold” laws similar to that model have expanded the scope of senior and vulnerable investor protections to specifically include both disbursements and transactions. Roughly 1/3 of the U.S. population lives in these states. More states are currently considering enacting such a law with transaction protections. As such, expanding 2165 to include transaction protections would not only be in agreement with many existing state report and hold laws, but would likely match many state laws that are expected to be enacted over the next several years.

III. Best Execution

Regarding the best execution question that is sometimes raised, in the Regulatory Notice, FINRA states that:

Customers can be exploited through transactions as well as disbursements. However, extending Rule 2165 to transactions may raise complicated issues, such as the possibility of changes in a security's price during the hold and complying with a member firm's best execution obligations.

⁷ National Adult Protective Services Association Comment [Letter](#) re: FINRA RN 19-27. October 7, 2019.

⁸ North American Securities Administrators Association Comment [Letter](#) re: FINRA RN 19-27. October 8, 2019.

As discussed above, we strongly support extending Rule 2165 to permit member firms to place a hold on suspicious transactions. Extending the protections of Rule 2165 to include transaction holds should not cause issues with best execution compliance. It is not clear that best execution obligations would apply directly to a transaction hold. And even if best execution does apply, FINRA could clarify that members are not required to make a best execution determination if they are otherwise in compliance with the requirements for a transaction hold under Rule 2165, *i.e.*, the member reasonably believes that financial exploitation of the customer has occurred, is occurring, has been attempted, or will be attempted.

Further, when best execution-related concerns are raised, the only specific obligation that is generally referenced is FINRA Rule 5310. On its face, FINRA Rule 5310 applies specifically to firms' obligations when processing transactions. This would indicate that a member firm is not required to make a best execution determination in connection with determining whether to execute a transaction in the first place. If a member firm delays a transaction in compliance with a regulation allowing that delay, then no transaction would take place that would require a best execution determination.

In the alternative, if FINRA believes that Rule 5310 may apply to a transaction hold, then it could address any conflict through an amendment to Rule 5310, or by including Rule 5310 in the text of Rule 2165.01. For example, Rule 5310.08 provides that, "[i]f a member receives an unsolicited instruction from a customer to route that customer's order to a particular market for execution, the member is not required to make a best execution determination beyond the customer's specific instruction." In the service of creating a transaction hold mechanism to protect senior investors, FINRA could adopt a similar type of clarity under Rule 5310.

In this regard, we note that 11 states have enacted the broader transaction protection. We assume that a broker-dealer acting in compliance with one of those state rules would not be running afoul of Rule 5310 when delaying a suspicious transaction.

IV. Market Movement

As discussed in our first letter responding to this regulatory notice, 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 that the client is being victimized. An odd investment choice alone will rarely, if ever, give rise to a reasonable suspicion of financial exploitation. Generally, there are two instances where a client could be impacted negatively by a hold due to market movement. The first is when a client is being victimized and the market just happens to move in their favor, but they are unable to take advantage of the movement due to the delay.⁹ The premise that a bad actor may accidentally or incidentally benefit their victim should not stop FINRA from providing more robust investor protections.

The other situation in which a client may be negatively impacted due to market movement is when a firm delays a non-exploitative transaction. In the industry's experience to-date, this is a relatively rare occurrence and is greatly outweighed by the need to fully protect clients from exploitation. As discussed above, exploitative transactions can have an equally damaging and life-threatening effect on senior and vulnerable investors. Clients can lose their life savings. The financial losses can be irrecoverable. The health consequences even more damaging. In short, if a broker-dealer reasonably suspects that their client is being victimized, firms should be able to take reasonable steps to protect their clients – regardless of whether the bad actor is seeking cash in hand or some other ends.

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

Sincerely,
/s/
Marin E. Gibson
Managing Director and Associate General Counsel
SIFMA

⁹ In this situation, it is also worth considering that a client may not have requested the transaction but-for the actions of a bad actor.