



NASAA

NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

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December 8, 2020

By email to: pubcom@finra.org

Jennifer Piorko Mitchell
Office of the Corporate Secretary
Financial Industry Regulatory Authority, Inc.
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 20-34: Senior Investors – Proposed Amendments to FINRA Rule 2165 and Retrospective Rule Review Report

Dear Ms. Mitchell:

On behalf of the North American Securities Administrators Association, Inc. (“NASAA”),¹ I am writing in response to the Financial Industry Regulatory Authority (“FINRA”) *Regulatory Notice 20-34: Senior Investors – Proposed Amendments to FINRA Rule 2165 and Retrospective Rule Review Report* (the “Proposal”).² The Proposal is of particular interest to NASAA and its members given that senior investors are increasingly targeted for fraud and abuse. NASAA also appreciates FINRA’s focus on protecting persons with mental or physical impairment.

NASAA, FINRA, and the SEC have worked collaboratively on senior investor protection issues and concerns in the past, and we look forward to doing so again here.³ NASAA previously

¹ Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA’s membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

² The Proposal is available at <https://www.sec.gov/rules/sro/finra/2020/34-89218.pdf>.

³ See Press Release: SEC, NASAA, and FINRA Issue Senior Safe Act Fact Sheet to Help promote Greater Reporting of Suspected Senior Financial Exploitation FOR IMMEDIATE RELEASE 2019-75 (May 23, 2019) available at https://www.sec.gov/news/press-release/2019-75#_ftnref1; Economic Growth, Regulatory Relief and Consumer Protection Act, Pub. L. 115-174 § 303 (2018); Commissioner Allison Herren Lee, *Remarks at the SEC Roundtable on Combating Elder Investor Fraud* (Oct. 3, 2019), available at <https://www.sec.gov/news/public-statement/lee-remarks-sec-roundtable-combating-elder-investor-fraud>.

commented on FINRA’s retrospective rule review,⁴ as well as the proposing release for Rule 2165⁵ and Rule 4530. We appreciate FINRA’s consideration of our comments on this important matter.⁶

As currently written, the NASAA Model Act to Protect Vulnerable Adults from Financial Exploitation (the “Model Act”)⁷ and FINRA Rule 2165⁸ generally complement each other.⁹ This alignment ensures that broker-dealers and investment advisers observe the same standards when confronted with the signs of potential financial exploitation of a vulnerable person. Today, one of the actions that a broker-dealer (under FINRA rules) or investment adviser (under certain state laws) may take is placing a hold on the disbursement of funds for a specified time period. FINRA has proposed to expand the scope of Rule 2165 to include transactions and lengthen the period of time such holds may remain in effect.

Whether to extend the hold to include transactions and the appropriate time for holding disbursements or transactions were questions that NASAA considered in drafting the Model Act. Ultimately NASAA declined to include transactions, noting the following concerns: investor autonomy, best execution requirements, potential for firm abuse, and potential for market losses. Should FINRA decide to move forward with its proposal to add transactions to the existing disbursement hold and extend the time period for each, we recommend the following changes.

I. FINRA Should Require Firms to Notify State Agencies of Holds No Later Than 15 Business Days After They Are Imposed.

The Proposal would permit a broker-dealer to extend a temporary hold for up to 55 business days if it reports the hold or otherwise notifies an appropriate state regulator, agency, or court. NASAA believes that the current 25 business day hold period, with the added safety valve of extensions under the authority of state agencies or the courts, is the better approach as it provides significant time to conduct the investigation and avoids unintended hardships from lengthy delays. While there may be instances where investigating the questions underlying a hold takes longer

⁴ See Letter from Christopher Gerold, NASAA President, to Jennifer Piorko Mitchell, FINRA Office of the Corporate Secretary, *Re: Regulatory Notice 19-27: Retrospective Rule Review* (Oct. 8, 2019), available at <https://www.nasaa.org/wp-content/uploads/2019/10/NASAA-Comment-Letter-Re-Reg-Notice-19-27-10-8-19.pdf> (“NASAA 19-27 Comment Letter”).

⁵ See Letter from Judith Shaw, NASAA President, to Marcia E. Asquith, FINRA Office of the Corporate Secretary, *Re: Regulatory Notice 15-37: Financial Exploitation of Seniors and Other Adults* (November 30, 2015), available at <https://www.nasaa.org/wp-content/uploads/2011/07/Final-NASAA-Comment-to-FINRA-15-37.pdf> (“NASAA 15-37 Comment Letter”).

⁶ See NASAA 19-27 Comment Letter 2-3, 5, and 8-10; and Proposal at 12-17.

⁷ NASAA Model Legislation to Protect Vulnerable Adults from Financial Exploitation, January 22, 2016 (the “Model Act”), available at <http://serveourseniors.org/wp-content/uploads/2015/11/NASAA-Model-Seniors-Act-adopted-Jan-22-2016.pdf>.

⁸ FINRA Rule 2165.

⁹ Compare *id.* (15 day hold period with extensions by agency or court, subject to 10 day extension at member firm’s discretion; further hold with regulator or court discretion) with NASAA Model Act (15 day hold period, subject to 10 day extension at securities commissioner or APS discretion; further hold with court discretion).

than 25 days, the present requirement that firms obtain approval for such an extension from an appropriate authority,¹⁰ such as a regulatory authority or a court, strikes the appropriate balance and ensures that both the investor and the broker-dealer have the opportunity to voice concerns in front of an independent arbiter.

In a majority of states, firms are subject to legislative and regulatory requirements in addition to those set forth in Rule 2165.¹¹ In those jurisdictions, the securities regulator and adult protective services (or like agency) would be notified of potential financial exploitation well before any notice would be provided under proposed Rule 2165 (if the firm wishes to invoke the civil and regulatory safe harbor provisions under a state's version of the Model Act). In jurisdictions that do not mandate disclosure to a state agency, however, the Proposal would increase the scope of a potentially negative trend in which broker-dealers have the authority to delay disbursements and deny investors access to their funds for up to 55 business days. Meanwhile, state agencies and those equipped to deal with financial exploitation or other abuses against the "Specified Adult" could be oblivious to the potential harm for up to five weeks.¹² We question whether this fact scenario facilitates the best interests of the investor.

NASAA has previously taken the position that FINRA and state agencies should be notified within two business days any time a hold is placed on an investor's account. If a firm must form a reasonable belief that exploitation has occurred or will be attempted in order to place a hold in the first place, it makes sense to require the firm to share that belief with appropriate authorities who can intervene to protect the investor and determine whether other measures may be necessary to protect the investor from exploitation.¹³ We note in passing that the escalation to state agencies does not relieve the firm of the obligation to conduct its own investigation and report as required under the Model Act or FINRA reporting requirements. However, as holds are an extraordinary action and method of last resort, engaging appropriate regulatory entities and state agencies as soon as feasible would advance the cause of protecting vulnerable adults.

While FINRA revisits this rule, we think it more appropriate to involve state agencies and adult protective services within the initial 15 business day hold period specified in Rule 2165(b)(2). The importance of doing so is noted in Regulatory Notice 20-24, that the most common reason firms were unable to resolve a matter within the 25 day hold period was that the matter was under consideration by a state agency (such as APS) or a court. Notification as soon as possible allows firms to continue their internal review of the potential fraud, remain in contact with the investor,

¹⁰ See Rule 2165(b)(2)-(c); supra FN 9. As currently written, firms can hold disbursements for 15 days, with a discretionary 10-day extension, or seek state agency or court approval to extend the hold period for further investigation and review.

¹¹ See Proposal at 6 noting that 31 states have senior investor protection and disbursement hold laws.

¹² NASAA realizes that FINRA has not initiated any actions for a abuse of the disbursement hold provision and would take swift action under the Just and Equitable Principles of Trade (FINRA Rule 2010) against bad actors. Through internal conversations and surveys, FINRA and states have not had to take such actions under the current rule or state laws. However, for NASAA it is still a concern that a firm could, in theory, separate an investor from funds or transactions for up to 11 weeks.

¹³ NASAA 15-37 Comment Letter at 6.

and communicate with the regulator if or when more time is needed to follow up on an investigation. This process, along with information sharing and collaboration with state agencies and adult protective services, would better serve to protect investors and proactively identify potential exploitation and abuse. While not as effective as immediate notification, providing notice within the initial 15 business day period would better allow appropriate state agencies to do two things: (1) to determine whether actions beyond the hold at issue are needed to protect the investor; and (2) to monitor the actions of the firm to the extent that they feel it is necessary to make sure the firm is acting in the investor's best interest, both in terms of the initial hold decision, and in terms of its subsequent investigation and deliberations. An earlier notification requirement – with the possibility of contemporaneous regulatory inquiry and oversight – would help ensure that firms act carefully and responsibly with the power provided by Rule 2165.

II. Firms Should Demonstrate Why Transaction Holds Are Necessary to Protect Clients.

In its current form, the Model Act provides only for holds on disbursements in cases of suspected exploitation.¹⁴ As noted above, at the time of its adoption, NASAA believed that the most good would be done, with the least intrusion on investor autonomy, through the disbursement hold alone, as it is generally the money leaving a client account that results in investor harm.

Since the Model Act's adoption, over 30 states have adopted or are about to adopt their own report and hold laws that in large measure follow the Model Act. However, certain of these states, though conforming to the Model Act's basic structure, allow holds on disbursements, transactions related to a disbursement, or transactions as a whole (which include disbursements) within client accounts.¹⁵ If FINRA extends the safe harbor under Rule 2165 to transactions, the supervision and documentation requirements under Rule 2165(c)-(d), and the training specified under Supplementary Material .02 to Rule 2165, must be enhanced to require a documented rationale stating why the broker and firm believe that a transaction hold will protect the investor whereas a disbursement hold would not. This documentation should be reviewed as a part of all FINRA examinations if it is not already. FINRA should stress that in the already limited use cases for Rule 2165, disbursement holds should be the default. A transaction hold should be utilized where a disbursement hold cannot adequately protect an investor. Furthermore, FINRA should provide guidelines for firms to establish policies and procedures to address the investor harm that may result from putting a transaction hold in place including investor losses and other hardships.¹⁶

¹⁴ NASAA 19-27 Comment Letter at 2-3. NASAA noted a conscious decision to limit holds to disbursement resting on three prongs: First, limiting the delay to disbursements respects the rights of clients, regardless of age, to direct the management of their funds absent some legal determination of incapacity. Second, a delay in the transaction could be deemed inconsistent with best execution requirements. Third, allowing a delay in transactions could result in greater loss or gain on the account depending upon market volatility at the time, increasing potential litigation and reputational risk for the firm.

¹⁵ See, e.g. S.B. 1438, 54th Leg., 1st Reg. Sess. (Ariz. 2019); S.B. 496, 2019-2020 Reg. Sess., (Cal. 2019); S.B. 433, 146th Leg., Reg. Sess. (R.I. 2019).

¹⁶ For example, if a broker dealer placed a transaction hold on an elderly investor's account who was concerned by Covid-19 and wished to withdraw all investments on March 1, 2020, the account would have lost 40% of its value by the time the 25 business day hold period lapsed under the current version of Rule 2165. The firm

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III. Conclusion.

NASAA supports the work of FINRA in protecting senior investors, and we appreciate the opportunity to comment on the Proposal. We look forward to FINRA's continued partnership with the SEC and state securities in protecting vulnerable investors.

Should you have questions, please contact either the undersigned or NASAA Counsel, Kameron Hillstrom, at (202) 737-0900.

Sincerely,



Lisa Hopkins

NASAA President

General Counsel and Senior Deputy

Commissioner of Securities, West Virginia

should have policies and procedures in place to address losses in the account and how it responds to impacted investors. This will alleviate ad hoc responses from disparate branch offices and promote equal treatment for all levels of investors.