

# Comments to FINRA Regulatory Notice 20-34

The Philadelphia Financial Exploitation Prevention Task Force is pleased to comment on FINRA's Regulatory Notice 20-34 (Propose to Amendments to FINRA Rule 2165 and Retrospective Rule Review Report). It is clear from the recommendations that protection of senior investors remains a top priority for FINRA. We would like to thank FINRA for all their great work in this area. Here are our comments:

## **Hold Period**

The Task Force agrees with FINRA's recommendation to extend the hold period an additional 30 business days. We suggested 60 days in our initial comments but we are very pleased with the proposed total of a 55 business day hold extension. The survey data from your members supports this extension as well as data from Adult Protective Services programs (APS). The latest data submitted to the National Adult Maltreatment Reporting System (NAMRS) indicates the average investigation duration of all reported cases is 52.6 days. (1) Recognizing that financial exploitation investigations are often more complicated and time consuming, we are grateful for the additional days as a starting point with the ability to revisit as more data become s available.

We would like a clarification on the wording in the last paragraph of the Hold Period which states "FINRA is proposing amending Rule 2165 to permit extending a temporary hold for an additional 30 business days if the member firm had reported the matter to a state agency or court of competent jurisdiction." We are commenting on the notable absence of law enforcement from the equation as some cases are reported to law enforcement without the involvement of APS and sometimes it is local and not state law enforcement that is involved.

The Task Force again notes the diversity in APS programs and difficulty in obtaining an extension of a temporary hold from an APS agency or a court. The Task Force recommends that FINRA partner with NAPSA to bring awareness and solutions to this problem as NAPSA has developed a new protocol and forms that addresses this matter.

## **Transactions in Securities**

The Task Force is pleased to see that FINRA is recommending that holds should be extended to matters beyond disbursements. We salute FINRA for proposing the creation of the first uniform national standard for placing holds on transactions related to suspected financial exploitation. This is an important step in the protection of investors and further demonstrates FINRA's leadership and commitment in protecting vulnerable investors.

## **Cognitive Decline or Diminished Capacity**

The Task Force reiterates our position that Rule 2165 be expanded to include temporary holds on transactions when a firm is concerned about customers managing their own assets as opposed to only when there is financial exploitation by a third party. FINRA has decided not to propose to extend Rule 2165 in this scenario and cites lack of expertise and too much discretion on part of the members as well as impeding on the autonomy of the investor as their major concerns. We share some of the concerns and recognize that this a sensitive and complicated matter; however, we think this is overshadowed by the potential harm to investors if action is not taken.

Financial service professionals are in a unique position of often being the first and only place to detect the potential of financial harm. We all know how quickly wealth can be lost and the devastating effect this has on older investors who are not in a position to reclaim the losses. We believe that through experience and education offered by FINRA as well as many other entities that many members have or can get the required expertise to recognize the red flags and the hold would enable the investor to be protected while an investigation is completed. We think the existing protections in the process put in by FINRA and the individual firms mitigate the discretion that individuals would have.

Many studies link cognitive ability to financial decision making. Data reported by APS programs report that over 31% of victims of financial exploitation suffer from cognitive issues. (2) A 2019 study in Health Economics concluded that people in the early stages of Alzheimer's Disease (AD) face a heightened risk of damaging financial outcomes. (3) Stiegel reported in 2012 that people in early stages of Alzheimer's disease are more likely to be susceptible to financial exploitation and fraud by others. (4) Wood and Lichtenberg stated in 2017 that "individuals who are mildly impaired prior to AD are the perfect victims as they have control of their assets but have impairment that may not be recognized and have broad exposure to the community." (5)

We think it is critical that the ability to hold and report be maximized here to protect vulnerable investors. We believe the costs and benefits described in the sections related to the Hold Period and Transactions in Securities are germane here as are the protections described in the respective sections.

#### **FINRA Rule 4512**

The requirement of member firms to obtain the name of and contact information for a trusted contact person upon the opening of a non-institutional customer's account or when updating account information for a non-institutional account is a great resource for all of us in investor protection and the benefits are obvious. We expressed that the usage rate was rather low in the first year and still would like to see a higher usage. Information in the regulatory notice was unclear as it was stated that most survey respondents reported a 25 % or less of the firm's existing or new clients had provided trusted contact information.

We recommended that FINRA look at other industries like the long-term care insurance industry that have similar requirements and a much higher success rate. One practice is to create a check box asking if you would like your emergency contact be your trusted contact.

We are recommending more specific ideas be provided such as FINRA publishing stories of how the provision has helped protect investors and perhaps a video discussion with the trusted contact and client which proved instrumental in stopping exploitation and fraud.

We would also like to see the FINRA Foundation create an annual campaign to promote the use and benefits of having a trusted contact person on the account. Older investors are used to the Medicare open enrollment period annually and this could be done and would be much easier to navigate.

### **Direct Fund Accounts**

As we mentioned in our previous comment letter dated October 7, 2019, we would very much appreciate FINRA advocating on behalf of member firms with the US Securities and Exchange Commission (SEC) in order to harmonize temporary hold requirements as it pertains to open-end investment companies (“mutual funds”) and their transfer agents. In an SEC No Action Letter to the Investment Company Institute (ICI) dated June 1, 2018 (6), the ICI astutely identified a gap in protection of mutual fund investors where shareholder accounts are held directly with the mutual fund and serviced by the fund’s transfer agent (“direct-at-fund” accounts). While the transfer agent may suspect financial exploitation, under current law, when a fund's transfer agent suspects financial exploitation in a direct-at-fund account, it cannot lawfully delay the disbursement of redemption proceeds while it investigates the situation. This is because the transfer agent is acting as an agent of the fund, and Section 22(e) of the Act prohibits a mutual fund from delaying the disbursement of redemption proceeds for more than seven days. (7)

The SEC agreed with the ICI and granted no-action relief to registered open-end investment companies and their SEC-registered transfer agents if, in the limited circumstances and subject to the conditions described in the ICI letter, the transfer agent, acting on behalf of the mutual fund, temporarily delays for more than seven days the disbursement of redemption proceeds from the mutual fund account of a Specified Adult held directly with the transfer agent based on the transfer agent’s reasonable belief that financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted. There were nine conditions outlined in the ICI letter, which are substantially similar the requirements outlined in FINRA Rule 2165 and 4512.

Broker-dealers who are members of our task force have had experiences with investment companies and their affiliated transfer agents who have chosen not to adopt policies and procedures in accordance with the SEC’s ICI No Action Letter described above, presumably due to the burdens of the conditions outlined in the ICI letter. Consequently, the investment companies and/or their affiliated transfer agents will not accept instructions from a broker-dealer listed on the investor’s account to temporarily hold transactions. Without coordinated requirements, it leaves member firms helpless to temporarily hold a transaction for a direct-at-fund account while they conduct an investigation into the suspected exploitation and thereby are rendered ineffective in protecting the investor. The SEC has expressed a common mission to protect senior investors and, given this common goal, we are requesting that FINRA advocate to harmonize the requirements for broker-dealers and investment companies and their transfer agents.

### **Endnotes**

1. **McGee, L and Urban K (2020) Adult Maltreatment Data Report 2019. Submitted to the Administration for Community Living, US Department of Health and Human Services pg. 15.**
2. **McGee, L and Urban K (2020) Adult Maltreatment Data Report 2019. Submitted to the Administration for Community Living, US Department of Health and Human Services pg 27.**
3. **Roan Gresenz, Carole, Mitchell, Jean M., Marrone, James and Federoff, Howard A. (2019) Effects of Early-stage Alzheimer's on household financial outcomes. Health Economics, Volume 29, Issue 1, January 2020 pgs. 18-29.**
4. **Stiegel, Lori A., (2012) An Overview of Elder Financial Exploitation. Generations,36 73-80.**
5. **Woods, S., Lichtenberg, P.A. (2017) Financial Capacity and Financial Exploitation of Older Adults: Research Findings, Policy Recommendations and Clinical Implications. Clinical Gerontologist, 40 (1), 3-13.**
6. **<https://www.sec.gov/divisions/investment/noaction/2018/investment-company-institute-060118-22e.htm>**
7. **Section 22(e) of the Investment Company Act of 1940 prohibits a registered investment company from suspending the right of redemption or postponing the date of payment or satisfaction upon redemption of any redeemable security in accordance with its terms for more than seven days after the tender of such security to the company or its agent designated for the purposes for redemption.**

Thank you for the opportunity to comment and we look forward to working with you in the future.

Joe Snyder, Chair

Philadelphia Financial Exploitation Prevention Task Force