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Via Email to pubcom@finra.org
Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1700 K Street, NW
Washington, DC 20006-1506

Re: FINRA Regulatory Notice 24-13, Retrospective Rule Review: Day Trading

Dear Ms. Mitchell,

Thank you for the opportunity to provide feedback in response to FINRA's request for comments on the effectiveness and efficiency of its requirements relating to day trading. We are writing this comment on behalf of the Securities Arbitration Clinic at St. John's University School of Law ("Clinic"). The Clinic is part of the St. Vincent de Paul Legal Program, Inc., a not-for-profit legal services organization. The Clinic represents aggrieved investors with small dollar claims and is committed to investor education and protection. We have had numerous investors seek the help of the Clinic due to financial losses and regulatory uncertainties

associated with day trading. Accordingly, the Clinic has a strong interest in the review of day trading regulations to further investor protection, especially in light of the changing investor landscape.

The Clinic recommends that FINRA (1) amend Rule 2130 to remove the promotion requirement; (2) enhance disclosure requirements under Rule 2270 by incorporating specific examples and introducing "just in time" disclosures before trade execution; (3) implement a "reasonable belief" standard to Rule 2130(a)(2); and (4) alter the current pattern day trader rules.

I. Changing Landscape

The changing investor landscape has elevated the need for current day trading rules to be updated to protect investors in today's environment. In recent years, there has been a major shift in investing habits and the kinds of individuals who are investing. We are currently on uncharted grounds regarding the way individuals learn information. For example, today, investors often rely on social media when determining what stocks to trade, as opposed to seeking out investment professionals or other trusted resources.[1] Furthermore, the barriers to entry for investing have been significantly reduced. We now see people trade on their phones at the click of a button.[2] This ease in trading has led to individuals making riskier trades and not considering the negative consequences that may arise when trading, such as drastic financial loss.

When FINRA first implemented its pattern day trader rule in 2001, the trading landscape was vastly different from what it is today. At the time, retail investors relied on slower internet

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[1]Investors in the United States: The Changing Landscape, A Report of the National Financial Capability Study, FINRA Investor Education Foundation, at 1 (2022), https://www.finrafoundation.org/sites/finrafoundation/files/2024-10/NFCS-Investor-Report-Changing-Landscape.pdf.
[2] *Id.*

connections, desktop-based trading software, and often had to place orders manually over the phone with brokers. Trade execution speeds were significantly slower and access to real-time market data was limited compared to today's instant and seamless streaming capabilities. Perhaps most importantly, the costs associated with trading were also much higher. This made frequent trading more expensive and less accessible to the average retail investor. Today, the rise of "zero" commission trading platforms has removed many of these barriers, making it easier for individuals with limited capital to engage in frequent trading, often without the means to withstand substantial or complete losses – including losing more than they have invested if they are trading on margin. Additionally, technological advancements, such as AI-driven analytics, algorithmic trading, and real-time risk management tools have given investors more sophisticated ways to analyze price movements and execute trades at lightning-fast speeds.[3]

Another major development has been the expansion of tools and resources designed to support traders in navigating margin requirements and the Pattern Day Trader ("PDT") rule. While some brokers offer features like real-time margin tracking, trade alerts, and automated safeguards to help traders manage their risk, education on the complexities of margin trading and PDT restrictions is still lacking. Many new investors enter the market without fully understanding how margin works, the risks of leverage, or how to avoid PDT violations, often learning through trial and error rather than structured guidance.[4] Although some platforms provide short educational courses, these resources are not always comprehensive, leaving gaps in

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[3] *See How Technology is Transforming the Investment Landscape*, Forbes (Feb. 14, 2023), https://www.forbes.com/councils/forbesbusinesscouncil/2023/02/14/how-technology-is-transforming-the-investment-landscape/.

[4] We agree with the concerns raised by NASAA in its Comment Re: Regulatory Notice 24-13, Retrospective Rule Review: Day Trading (Jan. 28, 2025), https://www.finra.org/sites/default/files/NoticeComment/NASAA%20Comment%20Letter%20re%20FINRA%20Reg.%20Notice%2024-13%20%2801-28-2025%29.pdf.

knowledge that can lead to costly mistakes. As retail trading continues to grow, the need for clearer, more accessible education on margin trading remains a critical issue.

II. Promotional Material

We recommend that FINRA remove the "promoting a day-trading strategy" requirement under Rule 2130, therefore extending the Rule 2130 requirements to all members. Members often use digital engagement practices ("DEPs"), including games and contests, notifications of inactivity, and highlighting frequently traded stocks, to promote investing opportunities to customers. This gamification of the market has a major effect on trading patterns by pushing investors to invest more frequently and in securities they otherwise would not.[5] Additionally, these DEP promotions have become more personalized over time as members will now send investors targeted DEPs, such as push notifications, sector-based recommendations, personalized portfolios, and data mining-driven investment suggestions. Furthermore, DEPs presented as general investment research do not qualify as promotion under the current definition, but the risks associated with making a day-trading strategy available are the same.

For members not actively promoting day trading, no special approval is required unless the investor meets the pattern day trading criteria. This thin line between generalized research and outright promotion of day trading creates a gray area for targeting investors through DEPs. Members often use "digital nudges," meaning push notifications by members to investors.[6] These notifications may inform the investor of a trending stock or other market information. While these "nudges" may not fall under the current promotion designation, they increase the

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[5] *See How Powerful Is Gamification In Investing?*, NASDAQ (Oct. 30, 2023), https://www.nasdaq.com/articles/how-powerful-is-gamification-in-investing.

[6] *See* Morningstar Comment Letter to FINRA in Regulatory Notice 24-13, at 2-3 (Jan 28, 2025), https://www.finra.org/sites/default/files/NoticeComment/Morningstar%20-%20FINRA%20Day%20Trading%20Letter.pdf.

investors' likelihood of trading. Therefore, members who are encouraging day trading, but who do not meet the technical requirements of "promotion," are not subject to Rule 2130. Removing the promotional requirement would result in all members being regulated by Rule 2130, thus ensuring the rule reaches investors who are currently not being protected.

Additionally, the current rule allows investors to be promoted to by one member and then trade through another member without ever receiving the intended screening before day trading. This loophole leaves investors vulnerable to the promotion-influenced day trading that Rule 2130 is designed to protect against. Removing this promotional requirement would close this loophole and ensure all investors are properly screened and informed of the risks before day trading.

III. Disclosure Requirements

The current approval process for opening a day trading account requires compliance with FINRA Rule 2130, which mandates a risk disclosure statement and confirmation that day trading is appropriate for the customer, or a written agreement from the customer stating that they do not intend to day trade. When determining whether day trading is appropriate, the member will look to factors such as the customer's investment objectives, experience, financial situation, and tax status. While these factors are important, more should be done to ensure that the investor is properly informed of all risks, regardless of whether the member has reasonable grounds to believe day trading is right for the customer. To satisfy this, we recommend revising the disclosure requirements to ensure that all investors are effectively informed and knowledgeable about the risks.

Rule 2130(a) requires members to provide investors with a risk disclosure statement set forth in Rule 2270. Rule 2270 requires broker-dealers that promote day trading strategies to

provide a specific risk disclosure statement to customers before opening an account for them. Broker-dealers may use FINRA's model disclosure language or an equivalent statement that meets the rule's requirements. Rule 2270 includes disclosures, such as the risks involved in day trading, the large commissions that can be generated even on trades of low amounts, and that losses may exceed the initial investment amount by the investor. Although the current disclosures are valuable and inform investors of certain risks associated with day trading, they often present generalized warnings that are outdated and fail to highlight the true challenges investors may encounter or deliver this information at the most critical moments. Accordingly, investors who do read the disclosures may discount their relevance.

We recommend revising the disclosures to provide examples of the risks, so investors can better understand the risk they are assuming. One way brokers can do this would be to provide examples in connection with each of the disclosures that demonstrate in concrete terms the potential effect of the risk. For instance, below the "losses may exceed initial investment" disclosure, there could be an example of "investor X invests $20,000" and then show that after various day trading activity, the investor could lose the $20,000 and even owe the firm money.

Additionally, continuous disclosures and disclosures made over different mediums may better alert investors to the high-risk realities of day trading. Instead of a one-time disclosure, having firms send disclosures potentially monthly or semi-annually could be a good way to remind investors of the risks of their day-trading activity. Moreover, FINRA should consider requiring that the disclosures themselves include digital engagement, such as layered disclosures and incorporation of audio or video versions of the disclosures.

Additionally, we recommend requiring risk disclosures to investors not just at promotion or on a set schedule, but immediately before trade execution, a/k/a "just in time" disclosures. An

example of this type of disclosure could be a message that appears right before an investor makes a trade that would qualify them as a pattern day trader, asking the investor if they are sure they want to go through with the transaction. The message could include some type of warning that if they make this trade, they will be classified as a pattern day trader under FINRA rules, with click-throughs for the additional explanation or other layered disclosure. Additionally, the message can be relayed that day trading, particularly on margin, comes with inherent risk, and doing so could lose investors a great amount of money in an extremely short time frame. This would help investors understand the risks they are taking in the moment and discourage impulsive trades driven by incomplete information or fear of missing out.

IV. Rule 2130(a)(2) Language

Under the current Rule 2130(a)(2), members may not rely on a written agreement that the customer does not intend to use the account for day trading if the member knows that the customer intends to use the account for this purpose. We believe this language should be altered to a "reasonable belief" as opposed to a "knowing" standard. The current knowing standard requires the member to actually know that the investor will use the account for day trading. Contrarily, a reasonable belief standard would require members to be vigilant in ensuring that unapproved customers are not day trading. If the member has a reasonable belief, they would then be obligated to meet the requirements of 2130(a)(1). Accordingly, members would have to keep better track of customer accounts, ensuring customers who do day trade are vetted and aware of potential risks.

V. Pattern Day Trader

FINRA Rule 4210(8)(B)(ii) defines a pattern day trader as any customer who executes four or more day trades within five business days. When an investor makes their fourth day trade within that five-day period, they are subject to potentially having their account flagged or frozen by the member. Investors have voiced concerns over the hardship these types of situations can create when they accidentally reach this threshold, unintentionally qualifying as a pattern day trader.

We recommend that FINRA require firms to institute a "just in time" notification to alert investors from unknowingly crossing this threshold and having their account potentially frozen, risking their flexibility to adjust investment opportunities and positions they currently hold. This "just in time" notification would alert the investors prior to their fourth trade in the five-day period to the pattern day trader designation they are about to receive and the risks that come with it. This will allow the investor to decide if they want to still execute the trade, with knowledge of its implications. Firms may also send push notifications after the third trade in a five business day period to alert investors that if they place another trade, they may be deemed a pattern day trader. This will provide advance notice that the rules may be triggered, and set out what the consequences are. The Clinic believes that investors and members alike can benefit from the clarity such a notification would provide, at little burden to either party.

In addition, Rule 4210(f)(8)(B)(iv) requires pattern day traders to maintain a minimum equity of $25,000 in their margin account or be subject to cash-only trading restrictions. This minimum equity figure of $25,000 has been criticized as being arbitrary and preventing access to day trading for small investors. We believe a more appropriate standard that would protect investors without denying them access to economic markets would be modeled on Regulation T,

and mirror the current margin requirements. This would adjust the threshold based on the size of the account, recognizing that investors may be investing with much lower sums of money. This would help tackle another fundamental issue faced by pattern day traders who fail to recognize that they might lose more money than they initially deposited into their margin account.

VI. Conclusion

The Clinic appreciates the opportunity to provide feedback and encourages FINRA to implement regulatory reforms that prioritize investor protection and fairness related to day trading. Thank you for the opportunity to comment on these important issues.

Respectfully submitted,

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