



PUBLIC INVESTORS ADVOCATE BAR ASSOCIATION

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*sent by email to:
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October 8, 2019

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

RE: Regulatory Notice 19-27 Request for Comment on Rules and Issues Relating to Senior Investors

Dear Ms. Piorko Mitchell:

I write on behalf of the Public Investors Advocate Bar Association (“PIABA”),¹ an international bar association comprised of attorneys who represent investors in securities arbitrations and other dispute resolution forums. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities dispute resolution forums, while also advocating for public education regarding investment fraud and industry misconduct. Our members and their clients have a strong interest in rules promulgated by the Financial Industry Regulatory Authority (“FINRA”) relating to investor protection, and in particular, senior issues.

PIABA members frequently represent senior investors, and we are particularly concerned with enhancing protections for our most vulnerable population of investors. Regulatory Notice 19-27 seeks comment on the impact of relatively new FINRA Rules 2165, 4512, and 3240, as well as whether other tools, guidance, or changes that may be appropriate for FINRA’s consideration. In addition to the comments set forth herein, we also attach a comment letter which PIABA submitted to the SEC in connection with its Roundtable on Combating Elder Investor Fraud, held this past week.

Financial Exploitation of Senior Investors is a National Problem

The National Adult Protective Services Association (“NAPSA”) reports that 90% of financial abusers are family members or trusted others and abuse is vastly underreported – only an estimated one out of 44

¹ Formerly known as the Public Investors Arbitration Bar Association.

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cases is reported.² Common forms of financial abuse by family members include misuse of a power of attorney or joint bank account, and threats to abandon the vulnerable person.³ In addition, bad actors in the securities industry may target elder investors, and their retirement accounts, for outright investment scams, or for inappropriately risky or otherwise unsuitable, high-commission investments. According to the 2018 Enforcement Report by the North American Securities Administrators Association (“NASAA”), the most often reported of these were promissory notes, real estate investment programs, affinity fraud (sales scams targeting a particular community or group), and Regulation D offerings (private placements exempt from SEC registration, certain disclosure and reporting requirements).⁴ Fraud by a financial advisor may cause greater harm to an individual because of the professional’s access to a customer’s funds, and may cause greater harm to society because there will likely be a greater number of victims than those subject to exploitation by a family member.

NASAA’s Model Act and States Adopting the Model Act

Recognizing the increasing problem of financial exploitation of investors over the age of 65, and the potential for *prevention* by financial advisors, NASAA formed its Committee on Senior Issues and Diminished Capacity in 2014. In September 2015, NASAA released its draft Model Act to Protect Vulnerable Adults from Financial Exploitation (“Model Act”). So far, twenty-three states have enacted legislation or regulations based on NASAA’s Model Act.⁵ The majority of these states follow the Model Act’s definition of “vulnerable adult” as including anyone age 65 or older. Those states also follow other NASAA Model Act provisions, such as: the time frames for permissive delays of disbursements, mandatory record keeping and state access to such records, mandatory reporting of suspected abuse to specified state agencies, and permissive notification to certain previously identified individuals (provided that they are not the suspected abuser).⁶ Correspondingly, FINRA proposed similar changes to its SRO rules in Regulatory Notice 15-37, issued in October 2015, which resulted in the adoption of Rule 2165 (Financial Exploitation of Specified Adults) and amendments to Rule 4512 (Customer Account Information). Unlike the Model Act, FINRA’s rules do not mandate suspected abuse be reported to specified agencies or law enforcement.

Requests for Comment Question Nos. 1-3 (Rule 2165)

Alignment with State Protections

At the outset, we note that one of the goals of the Model Act was to create some uniformity in legislation across the states regarding permissive delayed distributions and other operative features. PIABA is concerned that FINRA’s contemplated substantive changes to Rule 2165 may create confusion to the extent

² <http://www.napsa-now.org/policy-advocacy/exploitation/>.

³ *Id.*

⁴ 2018 NASAA Enforcement Report available at: <http://www.nasaa.org/46133/nasaa-releases-annual-enforcement-report-4/>.

⁵ <http://serveourseniors.org/about/policy-makers/nasaa-model-act/update/>.

⁶ For a detailed comparison, see Darlene Pasiieczny, *States Adopting NASAA’s Model Act to Protect Vulnerable Adults from Financial Exploitation (Mandatory and Permissive Conduct by Financial Advisors)*, PIABA Bar Journal, vol. 26, no. 2 (October 2019) (forthcoming).

they could contradict state legislation on the topic. For example, if the permissive delay period is increased from the existing period (up to 25 business days) to a contemplated longer period of time, conflicts could arise. Or, if the scope of Rule 2165 expands to include not just distributions of cash or securities from or between accounts, but also delays to transactions within an account (e.g. orders to sell), a possibility of conflicts could arise. We note that FINRA's proposed changes seek to offer even *greater* protections which is a laudable goal, but nonetheless, we encourage FINRA to harmonize any substantive changes with NASAA's guidance and existing state law. In furtherance of that goal, PIABA also suggests that FINRA make its rule mandatory, in conformity with the NASAA Model Act, rather than permissive.

Potential Application Where There is Reasonable Suspicion of Impairment

Diminished capacity, and more specifically, whether an individual has legal capacity when making a significant financial decision, is a notoriously difficult subject. Capacity may fluctuate day to day. A person may have difficulty with cognition at certain times of day, as a result of a change of medication or temporary physical condition and may later regain legal capacity. PIABA understands that FINRA is not suggesting that its members attempt to make any conclusive determination regarding capacity. Rather, FINRA contemplates whether similar safe harbor protections as those in Rule 2165 might be extended for a permissive delay where there is a reasonable suspicion of diminished capacity. This temporary delay of disbursement may allow for investigation, communication with a pre-authorized trusted contact person, and might prevent significant financial harm to an account. For example, an order to liquidate all holdings might incur substantial transaction fees or surrender fees. However, respect for autonomy of the client is also paramount. A person may choose to make informed decisions that the advisor disagrees with. PIABA suggests that FINRA conduct further research on such issues before modifying or instituting any rules on the subject.

Request for Comment Question Nos. 9-12 (Rule 3240)

PIABA agrees that Rule 3240 has been effective in protecting investors and public interest, specifically by addressing potential misconduct relating to associated persons of broker-dealer firms borrowing from or lending money to customers. Specifically, the Rule has served to deter fraud and manipulative practices involving senior investors' retirement savings by prohibiting such conduct. PIABA believes that, in situations where one of the enumerated exceptions apply, the current rule is broad enough to cover those instances in which lending or borrowing money from customers may be acceptable. Importantly, such situations first require appropriate disclosures and pre-approval by the broker-dealer firm, which is crucial to ensuring compliance with the Rule.

Request for Comment Question No. 13 (Enhancing Sanction Guidelines)

FINRA publishes the FINRA Sanction Guidelines so that members, associated persons and their counsel may become more familiar with the types of disciplinary sanctions that may be applicable to various

violations.⁷ The Sanction Guidelines suggest factors that Adjudicators may consider in determining where disciplinary conduct within a range sanctions may fall.

PIABA supports an amendment to the Sanctions Guidelines to add as a principal consideration whether a victimized customer is a “specific adult,” i.e., a person 65 or older or a person 18 or older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interest. Such language conforms with FINRA’s mission to protect investors and the public interest, including persons over 65 and any other person who a member believes may be unable to protect their own interest. Failure to do so ought to be factored in determining appropriate disciplinary sanctions. FINRA’s Sanction Guidelines ought to expressly clarify the types of individuals members must take reasonable steps to protect.

Request for Comment Question No. 17 (Additional Disclosure and Heightened Supervision when Marketing to Senior Investors)

Members of PIABA frequently represent senior investors who were placed in unsuitable investment products and investment strategies at the recommendation of their financial advisor. Oftentimes, these recommendations involve complex products which are difficult for unsophisticated investors to understand, such as promissory notes, real estate investment programs, and Regulation D offerings.

PIABA believes that heightened supervision is necessary for particular products or investment strategies that are marketed to seniors. While providing additional disclosures is an important step, investors are already faced with a deluge of disclosure language in paperwork which they may have trouble accessing or may not comprehend. Heightened supervision is necessary to ensure that a particular product or investment strategy is suitable for elderly investors. Firms should be required to set appropriate supervisory parameters and conduct reviews of public communications with these issues in mind.

Request for Comment Question No. 18 (Efficiency / Effectiveness of Rules and Guidance relating to Senior Investors)

Aggrieved investors are generally required to submit to FINRA’s Dispute Resolution forum all claims against broker-dealer firms or their representatives. FINRA provides guidance for its staff and arbitrators in cases involving individuals at least 65 years old or have a serious health condition.⁸ FINRA notes that, “upon request, staff will expedite the administration of arbitration proceedings in matters involving senior or seriously ill parties.” When a case is expedited, parties and arbitrators are instructed to schedule a hearing within six months of from the date of the Initial Prehearing Conference.

PIABA urges FINRA to emphasize the importance of resolving such disputes expeditiously, at a minimum through Regulatory Notices and additional guidance to arbitrators. FINRA ought to make clear

⁷ FINRA, Sanction Guidelines (March 2019), available at: https://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf.

⁸ FINRA, Office of Dispute Resolution Arbitrator’s Guide (November 2018 Edition).

that an expedited case scheduled for an evidentiary hearing beyond six months from the Initial Prehearing Conference should be the exception and only granted for good cause shown. Oftentimes, such cases are scheduled for hearing far after when FINRA intends, due to scheduling conflicts and claimed unavailability of counsel for broker-dealer firms or their representatives. In such circumstances, FINRA arbitrators ought to be instructed to scrutinize alleged scheduling conflicts or unavailability, especially for larger law firms which employ multiple attorneys. Such enhanced enforcement by FINRA conforms to its pledge of delivering fair, expeditious and cost-effective dispute resolution services for investors.

Request for Comment Question Nos. 19 and 20 (Additional Comments)

PIABA appreciates the broad request for additional comments relevant to the senior protection issues. We start with the observation that our members have found that the vast majority of seniors and other vulnerable investors do not know what FINRA is, do not know (or appreciate) that they have rights as investors and customer of broker-dealers, and/or do not know that they are susceptible targets to affinity fraud. This is a problem that FINRA should address by devoting more and more resources to education outreach to programs like or similar to AARP, American Society on Aging, SPRY and many other groups that help and advocate for the rights of vulnerable individuals. FINRA needs to make presentations, provide literature and generally be more visible to the people who these rules are designed to protect.

We are also concerned that recent changes to the FINRA website may make it more difficult for investors to find relevant information regarding elder investor protections. For example, the Securities Helpline for Seniors, Investor Complaint Center, and generally, information about Arbitration and Mediation, are now located at the far bottom of the FINRA.org home page. The contact phone numbers are particularly difficult to read in size, weight, and color of font. This critical information should appear at a prominent, top location, on the home page. PIABA encourages FINRA to consider reviewing the home page and other informational pages for legibility to elder investors.

Finally, PIABA strongly encourages FINRA to issue a separate Regulatory Notice regarding proposed rulemaking on the issue of the ability of a Registered Person to become a named beneficiary, executor, power of attorney, trustee, or similar for a non-family member customer. The abuse of a power of attorney is one of the major areas of financial exploitation identified by the National Adult Protective Services Association. And, the confidential position of trust held by a financial adviser may give rise to a presumption of undue influence under state law, where a client changes his or her estate plans in a way that benefits the adviser. Additional guidance from FINRA on the topic should help to curb abusive intrusion into investors' affairs and estate planning.

Ms. Jennifer Piorko Mitchell

October 8, 2019

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Conclusion

Once again, PIABA acknowledges and appreciates FINRA's recognition that our elder population is particularly vulnerable to financial abuse, by a trusted friend or family member, as well as by a trusted broker or other financial professional. The "safe harbor" protections of Rule 2165 give brokers tools to help their clients and prevent potential abuse. Likewise, the prohibitions of Rule 3240 make it clear that potentially abusive lending arrangements are impermissible.

PIABA encourages FINRA to work in tandem with NASAA and state regulators, who are positioned to understand the needs of their particular aging populations. PIABA also applauds FINRA for its continued review of its rules and guidance to improve investor protections. We thank you for the opportunity to comment on the Notice, and urge FINRA to consider the issues set forth above.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ch Lazaro".

Christine Lazaro

President

A handwritten signature in black ink, appearing to read "Samuel B. Edwards".

Samuel B. Edwards

Executive Vice-President



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*sent by email to:
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October 2, 2019

Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F St NE
Washington, DC 200549-1090

**RE: Roundtable on Combating Elder Investor Fraud
File Number 4-749**

Dear Ms. Countryman:

I write on behalf of the Public Investors Advocate Bar Association (“PIABA”), an international bar association comprised of attorneys who represent investors in disputes with their financial advisors. Since its formation in 1990, PIABA has promoted the interests of the public investor in all dispute resolution forums, while also advocating for public education regarding investment fraud and securities industry misconduct. Our members and their clients have a strong interest in issues facing elder investors and steps the Securities and Exchange Commission (the “Commission”) may take to protect such investors.

The Commission’s Retail Strategy Task Force is hosting a Roundtable on Combating Elder Investor Fraud. The Task Force has invited interested parties to submit comments on the subject of the Roundtable. PIABA appreciates the opportunity to provide the insight of our members and their clients on this very important topic.

Older Americans are typically at the peak of their wealth accumulation phase, making them an attractive target for fraudsters. Older Americans who are the victims of fraud may suffer both monetary damages as well as non-monetary damages such as emotional pain and suffering and feelings of shame and depression.¹

¹ See, e.g., Marguerite DeLiema, Martha Deevy, Annamaria Lusardi, and Olivia S. Mitchell, Exploring the Prevalence, Risk Factors, and Financial Consequences of Fraud: Evidence from the Health and Retirement Study, TIAA Institute (Apr. 2018), https://gflec.org/wp-content/uploads/2018/04/TIAA_Institute_Causes_and_Consequences_RD143_Mitchell_April-2018.pdf?x70028.

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Unfortunately, there is not rich data on fraud because it is often underreported. For example, according to a study conducted by the FINRA Investor Education Foundation, although 11% of survey respondents reported losing money in a likely fraudulent activity, only 4% actually admitted to being a victim of fraud.² Approximately a quarter of the survey respondents reported that they may have been asked to invest in a fraudulent investment and at least 16% reported investing money in a likely fraudulent offering.³ A TIAA Institute study found that as many as 8% of the survey respondents had been a victim of at least one fraudulent activity.⁴ In another study, 5% of survey respondents reported they had been the victim of a fraudulent investment in the past five years.⁵

In 2018, NASAA members brought enforcement actions that involved over 750 senior victims.⁶ The enforcement actions concerned unregistered securities, traditional securities, variable annuities, affinity fraud, equity-indexed annuities, and viatical or life settlements.⁷ Looking back at NASAA's enforcement statistics over the past five years, these products have consistently been connected with senior investor protection issues.⁸

Financial Vulnerability

Those nearing retirement may be in a more precarious financial position than past generations. For example, 71 % of Early Boomers, those born between 1948 and 1953, have debt when on the verge of retirement.⁹ In 2015, the median amount of debt held by Early Boomers was \$32,700, with the top quartile holding \$146,800 in debt.¹⁰ This means that more Americans will carry debt into retirement, and may face challenges servicing the debt in retirement. This study raised concerns that as older persons rebalance their portfolios from riskier investments to more fixed income assets, they may have even greater difficulties managing and paying off their debt burdens.¹¹

² FINRA Investor Education Foundation, *Financial Fraud and Fraud Susceptibility in the United States* (Sept. 2013) ("FINRA Financial Fraud Study"), p. 3, https://www.finrafoundation.org/sites/finrafoundation/files/Financial-Fraud-And-Fraud-Susceptibility-In-The-United-States_0_0_0.pdf.

³ *Id.*, pp. 18 & 20.

⁴ Marguerite DeLiema, Martha Deevy, Annamaria Lusardi, and Olivia S. Mitchell, *Causes and Consequences of Financial Mismanagement at Older Ages*, TIAA Institute (April 2018), https://gflec.org/wp-content/uploads/2018/04/TIAA_Institute_Causes_and_Consequences_TI_Mitchell_April-2018.pdf?x22667.

⁵ Marguerite DeLiema, Martha Deevy, Annamaria Lusardi, and Olivia S. Mitchell, *Financial Fraud among Older Adults: Evidence and Implications* (Dec. 2018), p. 8, https://gflec.org/wp-content/uploads/2018/12/FinancialFraud_JGSS.pdf?x70028.

⁶ NASAA 2019 Enforcement Report (Sept. 2019), p. 8, <https://s30730.pcdn.co/wp-content/uploads/2019/09/2019-Enforcement-Report-Based-on-2018-Data-FINAL.pdf>.

⁷ *Id.*

⁸ *See, e.g.*, NASAA 2017 Enforcement Report (2017), <https://s30730.pcdn.co/wp-content/uploads/2017/09/2017-Enforcement-Report-Based-on-2016-Data.pdf>; NASAA 2015 Enforcement Report (2015), https://s30730.pcdn.co/wp-content/uploads/2011/08/2015-Enforcement-Report-on-2014-Data_FINAL.pdf.

⁹ Annamaria Lusardi, Olivia S. Mitchell, and Noemi Oggero, *Debt and Financial Vulnerability on the Verge of Retirement* (Apr. 2019), p. 7, https://gflec.org/wp-content/uploads/2019/05/LusardiMitchellOggero_Debt_4-27-19-JMCB.pdf?x70028.

¹⁰ *Id.*

¹¹ *Id.* at p. 13.

Further exemplifying the financial vulnerability of older Americans, a third of survey respondents age 56 to 61 indicated they probably or certainly could not come up with \$2,000 in a month's time.¹² That may mean these individuals do not have the financial security to cover a relatively minor medical procedure or home improvement. In fact, another study found that 13% of survey respondents aged 55 or older had past-due medical bills, and 24% are concerned they have too much debt.¹³

Older Americans are also concerned about their financial security in retirement. The same study found that 42% of survey respondents aged 55 or older worry about running out of money in retirement.¹⁴ Among those who have accumulated savings in retirement accounts, the typical balance is about \$40,000.¹⁵ More than 75% fall short of conservative retirement savings targets based on a retirement age of 67.¹⁶ Another study found that among near-retirement households, 30% have no retirement savings, and another third have savings of less than their annual income.¹⁷ The typical near-retirement household only has \$14,500 saved.¹⁸ According to conservative estimates, at a retirement age of 67, retirees should have 8 times their annual income in savings.¹⁹ Even at that level, the retiree still has a one in four chance of running out of money.²⁰

With respect to financial literacy, fewer than half of the survey respondents answered the risk question correctly, and less than a third answered a compound interest in debt question correctly.²¹ One study found that almost 80% of survey respondents say retirees do not know enough about investing to ensure that their retirement savings will last them through retirement.²²

Investor Stories: Concerns about Retirement Income

The following investor stories highlight the concerns retired investors may have in retirement: running out of money. In both of these cases, the investors were lured into investing in products which were sold as providing them income streams throughout their retirement. Unfortunately, they didn't get what they bargained for.

¹² *Id.* at p. 21.

¹³ FINRA Investor Education Foundation, The State of U.S. Financial Capability: The 2018 National Financial Capability Study (June 2019), p. 10, 31, https://www.usfinancialcapability.org/downloads/NFCS_2018_Report_Natl_Findings.pdf.

¹⁴ *Id.* at p. 18.

¹⁵ Diane Oakley and Kelly Kenneally, Retirement Insecurity 2019 – American's Views of the Retirement Crisis, National Institute on Retirement Security (Mar. 2019) ("Oakley & Kenneally"), p. 1, https://www.nirsonline.org/wp-content/uploads/2019/02/OpinionResearch_final-1.pdf.

¹⁶ *Id.*

¹⁷ Nari Rhee, PhD and Ilana Boivie, The Continuing Retirement Savings Crisis, National Institute on Retirement Security (Mar. 2015), p. 11, https://www.nirsonline.org/wp-content/uploads/2017/07/final_rsc_2015.pdf.

¹⁸ *Id.*

¹⁹ *Id.* at p. 13.

²⁰ *Id.*

²¹ *Id.* at p. 33.

²² Oakley & Kenneally, *supra* note 15, p. 6.

A 72-year-old widow invested following a free lunch seminar at a local restaurant. The broker assured the investor that he would earn her an income stream of 6% while preserving her investment principal. The investor transferred her savings to the broker, who then invested her in non-traded REITs and a business development company. Not only were these investments risky, they were also illiquid. Ultimately, a FINRA arbitration panel ordered the brokerage firm to rescind the purchases of the investments and reimburse the investor for her losses.

An investor in her early 80's was sold private placements and a "private annuity" by her broker. The widowed investor was told she would have income that would last for the rest of her life. Shortly thereafter, the broker left the firm. The investments turned out to be fraudulent Ponzi schemes, but that was not uncovered until the broker eventually stopped making payments on the "investments" and was finally indicted for his fraudulent scheme. Ultimately, a FINRA arbitration panel ordered the brokerage firm to provide the investor with sufficient funds to allow her to purchase an annuity that would provide her with the income stream she had been guaranteed by the broker.

While these stories ultimately resulted in the investors receiving back at least a portion of their lost retirement through the FINRA arbitration system, there are many situations where similarly wronged investors received back no funds, such as when the guilty party and/or firm are no longer in business or do not have sufficient assets to pay from their wrongful conduct.

Lack of Financial Literacy

Investors lack basic financial literacy, and as a result, are not really in a position to manage their own investments, or to oversee a broker who is managing their investments. One study determined that many of the survey respondents lacked an understanding of basic investment terms, including what would be a reasonable return on an investment.²³ The study asked survey respondents how much risk they were willing to take to meet their retirement needs; more than half of the survey respondents indicated that they were not willing to invest in riskier investments regardless of their financial situation.²⁴

Other studies have also found that investors have low financial literacy when it comes to topics such as comprehending risk or compound interest. For example, in a recent study conducted by the TIAA Institute, over 60% of survey respondents answered questions about risk-related concepts incorrectly.²⁵ Another study found that half of survey respondents aged 55 or older could not correctly answer two simple questions about inflation and compound interest.²⁶

²³ FINRA Financial Fraud Study, *supra* note 2, p. 3.

²⁴ *Id.*, p. 10.

²⁵ Paul J. Yakoboski, Annamaria Lusardi, and Andrea Hasler, Financial Literacy in the United States and Its Link to Financial Wellness – The 2019 TIAA Institute-GFLEC Personal Finance Index (April 2019), pp. 3 – 5, https://gflec.org/wp-content/uploads/2019/03/TIAA-Institute-GFLEC_P-Fin-Index-Report_April-2019_FINAL-1.pdf?x70028.

²⁶ Annamaria Lusardi, Olivia S. Mitchell, and Vilsa Curto, Financial Sophistication in the Older Population (Feb. 2013), p. 1, https://gflec.org/wp-content/uploads/2014/12/a738b9_a94ad22b24a84672bf808e19bc0bca70.pdf.

Investor Stories: Vulnerable Investors

The following investor stories demonstrate how investors end up trusting bad advice from their financial advisors, in part because of the asymmetry in financial literacy between the investors and their financial advisors.

A group of investors were employees of the Fireman's Fund Insurance Company. Following "financial education seminars," the employees invested significant portions of their retirement savings in private placements. Some of the employees retired early, relying on the monthly interest payments they were receiving from the investments. Unfortunately, by mid-2008, most of the investments had stopped paying any interest. Ultimately, a judge ordered the firm responsible for the seminars to pay the investors over \$36.8 million to reimburse them for their losses.

In another situation, a 97-year-old investor wanted to ensure that, upon his death, his savings would be passed on to his heirs. Two unscrupulous insurance agents sold him on the concept of annuities, promising an "immediate 10% bonus," or "immediate 7% growth." They sold him three annuities over the course of two years, with the investor aged 98 for the last of the purchases. While promising above-average returns for him, what the agents and the underlying annuity issuers actually delivered were products with extraordinary internal fees, incredible complexity, and a near-guaranteed risk of loss insofar as the surrender value of the products would almost certainly be less than the amount invested. The products would have completely failed the intended purpose of providing a lump sum distribution upon the investor's demise since the only way to access *any* growth in the products as to hold the annuities for a period of at least five years, and then annuitize them for at least ten more. The investor would have had to reach age 109 in order to access the "accumulation value" – being the sum of the original investment and any growth thereon. To simply break even and access the amount he'd originally invested, he'd be required to have lived till the age of 102.

Unsatisfied with having made tremendous commissions on the first three annuities, the agents approached the investor a year later and convinced him to surrender the largest of the original three annuities, and a portion of another, and use the proceeds to buy a new annuity. The investor was 99 ½ years old at the time. The product the agents sold him: (1) offered no benefits beyond what he already had; (2) offered even more complexity than the products he'd been sold a year before; and, (3) offered the investor the opportunity to break even if he lived to age 114 ½. Particularly offensive was the fact that the death benefit to be paid was the surrender value – not the accumulated value. In short, the product *guaranteed* the investor a loss, whether he lived or died. After retaining an attorney, the investor was able to get out of the annuities and was able to meet his original goal of leaving his savings to his family, not his insurance agents.

Brokerage Firm Policies to Protect Seniors

NASAA examined steps brokerage firms may take to address senior investor protection. The NASAA study found that only 30% of brokerage firms had adopted senior-specific policies and procedures.²⁷ The individual policies and procedures varied from firm to firm. For example, with respect to suitability, some firms merely reminded brokers that certain suitability information, including age, income, and expenses, should be emphasized when considering a recommendation.²⁸ Other firms restricted what products, such as variable annuities and alternative investments, may be sold to senior investors.²⁹ Certain firms focused on particular concerns for senior investors, such as product concentration issues.³⁰ Over 80% of the firms surveyed did not have a senior-specific review process to monitor for changes to the investor's financial objectives.³¹

Investor Story: Failure of the Brokerage Firm to Protect an Elder Investor

The following investor story demonstrates how the lack of firm policies to follow up on red flags, such as a change of investment objective in an elder investor's account to be more aggressive, can cause harm.

An investor, a retiree, was assigned to a new broker after his prior broker passed away. The new broker sold off the investor's income producing investments and began to trade stocks instead. Shortly after taking over the account, the broker changed the investor's investment objective to "Speculation." Over the course of the next two years, the broker churned the account, eventually virtually wiping out the account value. Unfortunately, the investor passed away before he could do anything about the broker's misconduct.

Protecting Elder Investors

As a larger portion of our society approaches retirement with the aging of the Baby Boomer generation, more and more adults may be subject to investment fraud. As the stories above demonstrate, investors need additional protections to ensure those who have saved for retirement will actually have those funds available to them.

While some brokerage firms have taken on the responsibility of adopting policies and procedures aimed at protecting elder investors, more must be done. Currently, FINRA does not require brokerage firms

²⁷ NASAA, NASAA Broker-Dealer Section Study of Senior Practices and Procedures, 2016 – 2017 (June 2017), p. 7, https://s30730.pcdn.co/wp-content/uploads/2017/06/BD-Study-of-Senior-Practices-and-Procedures_06152017.pdf.

²⁸ *Id.* at p. 8.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at pp. 11 – 12.

to have supervisory policies specifically aimed at addressing the common red flags that may impact elder investors.

In 2017, NASAA suggested several measures that could be adopted by brokerage firms to improve their policies and procedures:

- 1) Clear definitions of “seniors” and “vulnerable adults”; firms should evaluate the need for definitions if they do not exist, taking into consideration those states that have adopted the Model Act;
- 2) Dedicated staff resources responsible for senior-related issues;
- 3) Guidance for communications with seniors and other senior-specific policies and procedures;
- 4) More frequent updates of account documentation for seniors, including investment objectives;
- 5) Heightened suitability review for seniors that is triggered by red flags such as investments in higher risk or complex products, account concentrations, or significant changes to account activity;
- 6) Training regarding senior issues including the identification and escalation of senior financial exploitation and diminished capacity;
- 7) Use of a trusted contact form and other resources to assist senior investors;
- 8) Proper escalation protocols, including clear and specific escalation instructions for registered representatives and other firm personnel, and the designation of decision makers for reporting concerns outside of the firm;
- 9) How and when to report matters to adult protective services, law enforcement, or state securities regulators; and
- 10) When to delay account disbursements as a result of escalated concerns.³²

NASAA’s suggestions are a good place for the Commission to start. However, rather than encouraging brokerage firms to adopt such policies and procedures, brokerage firms should be mandated to adopt such procedures.

Additionally, beyond simply heightened review for certain red flags, the Commission should consider disallowing firms from selling certain investors certain products. As an example, non-traded REITs and private placements are often sold to retirees as offering a guaranteed income stream, with little focus on their price volatility, illiquidity, and potential for inconsistent or non-existent income streams. Investors are not evaluating these investments on their own, rather these investors are relying on their brokers to make appropriate recommendations in line with the investors’ needs. Unfortunately, all too often, the investors are left to figure out for themselves how they will continue in retirement without access to their hard-earned savings.

³² *Id.* at p. 23.

Ms. Vanessa Countryman

October 2, 2019

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Conclusion

PIABA applauds the Commission's focus on Elder Investment Fraud. However, more must be done to protect investors and to ensure that their retirement savings are protected. Investors should not be left to fend for themselves after being the victim of fraud. PIABA would welcome the opportunity to further discuss these issues with the Retail Strategy Task Force.

Sincerely,

A handwritten signature in blue ink, appearing to read "Christine Lazaro".

Christine Lazaro

President

A handwritten signature in black ink, appearing to read "Samuel B. Edwards".

Samuel B. Edwards

Executive Vice-President