



## PUBLIC INVESTORS ADVOCATE BAR ASSOCIATION

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December 4, 2020

Jennifer Piorko Mitchell  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506  
[pubcom@finra.org](mailto:pubcom@finra.org)

**RE: Regulatory Notice 20-34  
Request for Comment on Retrospective Rule Review (Rule 2165 – Senior Investors)**

Dear Ms. Piorko Mitchell:

I write on behalf of the Public Investors Advocate Bar Association<sup>1</sup> (“PIABA”), an international bar association comprised of attorneys who represent investors in securities arbitrations. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration 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.

PIABA members frequently represent senior investors, and we are particularly concerned with enhancing protections for this vulnerable population. PIABA previously commented on FINRA Regulatory Notices 15-37 and 19-27, which included a variety of senior protection proposals. Regulatory Notice 20-34 (“RN 20-34”) seeks comment on proposed revisions to one of those protections, FINRA Rule 2165, which creates a “uniform national standard” for FINRA-registered members and associated persons regarding certain tools to help prevent financial exploitation of specified adults, including a “safe harbor” provision allowing firms to place a temporary hold on a disbursement of funds or securities when there is suspected misconduct. Based on FINRA’s retrospective review, FINRA proposes extending the time of the permissible hold period under Rule 2165 and to allow temporary holds on securities transactions (not just disbursements).

### **PIABA Supports Enhanced Protections – With Caution**

PIABA deeply appreciates FINRA’s recognition that our elder population is particularly vulnerable to financial abuse. Abuse by a family member or friend is, tragically, common throughout the United States. The “safe harbor” protections of Rule 2165 give brokers important tools to help their clients and prevent potential abuse by third-party bad actors. The results of FINRA’s member survey described in RN 20-34 give important insights for improving these tools.

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<sup>1</sup> Formerly known as the Public Investors Arbitration Bar Association.

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However, PIABA is also concerned with investor autonomy and protecting senior investors *from member firms* potentially misusing the expanded hold periods and extension of holds to securities transactions.

### State Law Alignment Considerations

RN 20-34 references the Model Act to Protect Vulnerable Adults from Financial Exploitation, first promulgated by the North American Securities Administrators Association (“NASAA”) in September 2015. To date, 28 states have enacted legislation or regulations based on this Model Act.<sup>2</sup> Several additional states enacted statutes prior to the Model Act that include at least some of its elements.<sup>3</sup> The majority of these states follow the Model Act’s definition of “vulnerable adult” as including anyone age 65 or older, as well as other provisions: the 25-business day total time frame 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).<sup>4</sup>

According to RN 20-34, 16 of the 31 states with laws that allow investment advisers or broker-dealers to place some form of hold on suspicious requests extend to securities *transactions within an account*, as well as distributions of funds or securities out of an account. This is different than the Model Act, which is limited to disbursements only. Furthermore, an extension of the hold time to 30 business days would go beyond the Model Act’s total 25-business day hold period for permissive delays.

In its comment to RN 19-27, PIABA cautioned FINRA against substantive changes to Rule 2165 that might conflict with enacted state law.<sup>5</sup> However, it appears that states recently adopting some version of the Model Act and now about half of the states with such laws prefer the extension to securities transactions as well as distributions. The firm feedback noted in RN 20-34 suggests firms may benefit from increased permissible hold periods with appropriate safeguards.

### Mandatory Reporting Requirement May Dissuade Misuse of Rule 2165

PIABA is cautious regarding the proposed extension to securities transactions, as there could be significant monetary losses due to the failure to execute a legitimate purchase or sell instruction. PIABA is also concerned about potential misuse of the extended 30-business day hold period, for the same reason of market pricing changes, as well as potential delays in transferring an account to another brokerage firm. Bad faith conduct by the member firm to delay for purpose of financial benefit – for example, generating another month of commissions or fees – is not only frustrating but may be costly to an investor. A potential safeguard against such conduct is to add the requirement in the FINRA Rule 2165 that the member firm *must report* the suspected abuse to the appropriate state Adult Protective Services and state securities regulator. Most states adopting the Model Act *already have mandatory* reporting requirements to promptly notify state Adult Protective Services and the commissioner of securities (e.g., the state

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<sup>2</sup> <http://serveourseniors.org/about/policy-makers/nasaa-model-act/update>

<sup>3</sup> See e.g., Washington State, RCW 74.34.215 (Financial Exploitation of Vulnerable Adults) (allowing permissive temporary holds on disbursement of funds).

<sup>4</sup> For a detailed comparison, see Darlene Pasieczny, *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). Since the article’s submission for publication, several additional states adopted versions of the Model Act or adopted revised pending versions: Arizona, California, Florida, New Hampshire, New Jersey, Rhode Island, and West Virginia.

<sup>5</sup> State law protections following the Model Act apply to “qualified individuals” defined as any “agent, investment adviser representative or person who serves in a supervisory, compliance, or legal capacity for a broker-dealer or investment adviser.” Thus, these state laws generally apply to a broader category of individuals, but overlap with FINRA Rule 2165 for FINRA-registered members and associated persons.

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securities regulator) upon reasonable belief that financial exploitation of an eligible adult may have occurred, may have been attempted, or is being attempted.

Therefore, PIABA recommends that FINRA add to Rule 2165 the general requirements that the member firm: (1) update its written supervisory manuals to include training and review transactions suspected of elder abuse; (2) include in its retained records documentation of the firm's reasonable efforts to quickly investigate the matter; and (3) file a report with the appropriate Adult Protective Services agency and state regulator as soon as reasonably practical but no later than seven business days from the initial hold period.

By including more express documentation and a mandatory reporting requirement in the FINRA rules, no additional burden is put on the firms already making such reports in compliance with state law, and firms may be dissuaded from misuse of extending permissive hold periods.

### **Additional Protections Should Be Considered**

PIABA urges FINRA to continue to consider the following improvements to FINRA rules and practices:

- Amending the Sanctions Guidelines to add as a principal consideration for enhanced sanctions whether a victimized customer is a "specific adult," i.e., a person 65 or older or a person 18 or older who the member firm reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interest.
- Mandating heightened supervision for the marketing and sale of particular products or investment strategies to seniors that may have inherently higher risks, such as annuities, structured notes, private placements, and other illiquid, complex or "alternative" products.
- Emphasizing in Notice to Members and the Arbitrator's Guide that an expedited case (designated expedited based on age or illness) scheduled for an evidentiary hearing beyond six months from the Initial Prehearing Conference *should be the exception and only granted for good cause shown or stipulation of the parties.*
- Regularly reviewing and improving the legibility and ease of navigation of the FINRA website for senior investors to find the Securities Helpline for Seniors, the Investor Complaint Center, and generally, information about Arbitration and Mediation.

### **Conclusion**

PIABA encourages FINRA to continue 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 proposed rule and urge FINRA to consider the issues set forth above.

Sincerely,



David P. Meyer  
President