

**Statement by Christine Lazaro,  
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for the  
SEC Investor Advisory Committee Meeting  
Panel Discussion Regarding the SEC's Potential Role in Addressing Elder  
Financial Abuse Issues<sup>1</sup>**

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Thank you to the Committee and the Commission for the opportunity today to speak on this Panel. I would like to focus on a particular form of Elder Financial Abuse, abuse by a trusted financial advisor. While the industry plays an important role identifying and attempting to prevent abuse by other individuals, it is equally important that the industry ensure that its own members are not engaged in abusive behavior. Today, I will be discussing both investor protection issues and access to justice issues faced by elder investors.

In my Clinic and the others like mine, we predominately represent elderly investors who have been wronged by their broker or investment adviser. Often times these investors have turned their retirement saving over to a financial advisor, and that advisor places their own interests ahead of the investors' interests. For example, we recently had several cases where an investor's savings were placed in structured products or non-traded REITs and BDCs. In addition to these types of investments, my colleagues in other clinics are also seeing recommendations to purchase variable annuities and other complex investments. These investments are often marketed to the investors as a surefire way to generate the income they require to meet their living expenses in retirement. However, the financial advisors fail to explain that there may be significant costs and risks associated with the investments. For example, non-traded REITs and BDCs may divert up to 15% of the initial investment to expenses, including compensation for the broker and the brokerage firm recommending the product. The variable annuities often have high annual expenses and high surrender charges in the event the investor needs to withdraw their money. Many of the complex products are not traded on exchanges and therefore the products may be illiquid, meaning the investor cannot access their money if they have an unexpected expense that they need to cover. The advisors do not explain that in addition to the liquidity risks, the investor may also face a risk to their principal. However, this risk is often masked because the investment is not regularly valued and therefore may appear to have a steady value over a long period of time even though the underlying assets have declined in value.

Complex products such as these require extensive documentation and a thorough understanding by the investor of the product. Unfortunately, the investor is generally relying on the financial advisor's representation that the product is what the investor needs – a steady stream of income with little, if any, volatility. The investor signs whatever documents are placed before them, following the financial advisor's instructions to sign wherever directed. The investors do not read the hundreds of pages of

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<sup>1</sup> <https://www.sec.gov/news/upcoming-events/iac-120221>

investment materials that may be available. After all, they have gone to a professional and assumed they were getting good advice.

Unfortunately, it appears recommendations of these complex, costly, risky products did not decline with the implementation of Reg BI. Based on a recent study conducted by NASAA, complex, costly, risky products became more widely available.<sup>2</sup> Several of the concerning products, such as non-traded REITs and variable annuities are being recommended at approximately the same rates. Moreover, firms did not widely implement any restriction on sales of these products. For example, 51% of the firms surveyed did not restrict non-traded REIT sales based on age or retirement status. Additionally, 40% of the firms selling non-traded REITs participate in sales contests; 44% receive extra compensation beyond commissions from the product manufacturer; 40% receive extra compensation from another intermediary; and 83% receive conference or training reimbursement from the product manufacturer or a trade association. These firms have 33 million retail customers!

The financial advisors are recommending these products, not because they are what is best for the investor and certainly not because the investor requested the product, but because the financial advisor will receive significant compensation, often multiple times what they would receive if they recommended a mutual fund or bond. And unfortunately, it often takes several years for the risks to be exposed, generally at a time when the investor most needs their money. And, when an investor complains about these investments, the firms point to the signed documents as proof that the investor made a fully informed choice to invest. Nothing could be further from the truth.

Fortunately, some of these elder investors find their way to an investor advocacy clinic like the one I oversee at St. John's. However, many of these investors are unable to secure representation. Often, they are not investing huge sums of money. The investment may be twenty-five or fifty thousand dollars, which may be a small sum in terms of a lawsuit, but is life altering for many of our clients. And their losses may not be clear; sometimes the issue is simply that they cannot liquidate the product. It is difficult for investors to find attorneys able to represent them under these circumstances. It is not cost effective for an attorney to handle such a case. While there are a lot of attorneys who will handle a few pro bono or low bono cases a year, there are far too many investors left without representation.

Presently, there are only a dozen Clinics like mine across the country, and most are concentrated in the New York area. In Florida, there is only a single Clinic. There are no clinics at all in large states like California or Texas. In fact, there are no Clinics in 44 of the 50 states. Most of us are permitted to represent clients based on local rules or court orders and are therefore limited in terms of where we may practice. The Clinics also provide important investor education and fraud awareness, meeting with seniors and other vulnerable populations in our local communities to advance financial literacy and ensure that the investors understand their rights.

Many of the Clinics were started with grant money, either from a state securities regulator or from the FINRA Investor Education Foundation. However, there are no sources of on-going funding available for these types of Clinics. This Committee previously recommended that the FINRA Investor Education Foundation consider funding to existing Clinics beyond the start-up grants.<sup>3</sup> The Committee further

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<sup>2</sup> [https://www.nasaa.org/wp-content/uploads/2021/11/NASAA-Reg-BI-Phase-II-A-Report-November-2021\\_FINAL.pdf](https://www.nasaa.org/wp-content/uploads/2021/11/NASAA-Reg-BI-Phase-II-A-Report-November-2021_FINAL.pdf)

<sup>3</sup> <https://www.sec.gov/spotlight/investor-advisory-committee-2012/law-clinics-recommendation.pdf>

recommended that FINRA consider allocating fines and penalties to fund Clinics. Finally, the Committee recommended that Commission request legislation from Congress to allow it to permanently fund Clinics utilizing the SEC Investor Protection Fund.

None of these recommendations have been acted upon. As a result, the number of Clinics continues to decline, depriving elder investors of quality representation, protection, and education.

For those elder investors who are able to identify misconduct, seek assistance, and obtain representation in the arbitration process, there is still no assurance that they will be compensated. Even when investors are successful in arbitration, approximately one out of every three investors is left with an unpaid arbitration award. In 2019, 20 cents of every dollar awarded in arbitrations went unpaid.

This is particularly troubling for elder investors who have relied on their investments to provide for their retirement income. They do not have the luxury of time to recover these lost funds through other means. They are often retired and may be unable to find employment to provide replacement income. They have already suffered for years as they worked their way through the dispute resolution process, only to be left no better off than when they started. Addressing the unpaid award problem for these most vulnerable investors must be made a priority. Since 2016, PIABA -issued three studies examining these issues.<sup>4</sup> PIABA offered several possible solutions, the most encompassing being a national recovery pool. There are a number of ways such a pool could be funded. It may be funded with fine money. It may be funded through firm assessments, either based on the number of brokers at the firm or based on FINRA's risk assessment of the firm. Most recently, PIABA suggested that contributions to a pool could be a condition of utilizing a mandatory pre-dispute arbitration clause.

While further thought is given to how to effectively address this concern across the industry, it is imperative that the regulators step in and at a minimum, set up an investor recovery fund so that elder investors may be able to recover their lost funds after working their way through the dispute resolution process.

In conclusion, more must be done to protect elder investors as they invest their retirement funds on the front end. For example, the Commission can offer more explicit guidance in terms of how, if at all, a firm may comply with its Reg BI obligations when recommending complex, costly, risky investments to elder investors.

And, more must be done to provide the resources to protect elder investors who have been wronged by the financial advisors whose advice they sought. It is essential that Investor Advocacy Clinics receive funding to sustain the dozen that presently exist and ensure new Clinics are able to open in high need locations. This will further investor protection and education. Finally, when an elder investor receives an arbitration award, they must be paid.

Thank you for the opportunity to discuss these issues, and I look forward to taking your questions.

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<sup>4</sup> <https://piaba.org/piaba-newsroom/press-release-one-out-three-investor-awards-finra-arbitration-go-unpaid-national>; <https://piaba.org/piaba-newsroom/press-release-unpaid-arbitration-awards-reach-200-million-congress-must-force>; <https://piaba.org/piaba-newsroom/press-release-piaba-30-2020-finra-arbitration-awards-went-unpaid-september-29-2021>