



November 30, 2015

By Electronic Mail to [pubcom@finra.org](mailto:pubcom@finra.org)

Marcia E. Asquith  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

**Re: FINRA Regulatory Notice 15-37: Rules Relating to  
Exploitation of Seniors and Other Vulnerable Adults**

Dear Ms. Asquith:

The Florida International Bankers Association (FIBA)<sup>1</sup> appreciates this opportunity to respond to FINRA's request for comment on Regulatory Notice 15-37 ("RN 15-37" or the "Proposal"), which contains proposed rules addressing the financial exploitation of seniors and other vulnerable adults.<sup>2</sup> The Proposal would amend FINRA Rule 4512 (Customer Account Information), and adopt a new FINRA Rule 2165 (Financial Exploitation of Specified Adults).

FIBA is committed to constructively engaging federal and state legislative and regulatory bodies on behalf of the international financial services community. FIBA members support the development of solutions to assist financial institutions in their efforts to prevent elder financial exploitation, but financial services firms are neither qualified nor well equipped to handle decisions relating to the capacity and personal family and other circumstances of the nation's seniors. While the Proposal is well intended, it fails to recognize the costs and challenges financial services firms will be forced to grapple with to comply with the requirements of the Proposal, particularly the placement of holds on vulnerable clients' funds or securities against

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<sup>1</sup> FIBA, founded in 1979, is a non-profit trade association representing the interests of the international financial services community in Florida. Members of FIBA include major banks, securities broker-dealers, and investment advisers headquartered in Europe, Latin America and the Caribbean, as well as the United States. The primary focus of FIBA members is the provision of financial services to non-U.S. residents, including in the areas of international trade finance, international correspondent banking, and wealth management and private banking services. Established on a foundation of ethics, service, and trust, FIBA is committed to the future of international banking and the financial services industry. For more information about our organization, education and advocacy programs, visit [www.fiba.net](http://www.fiba.net).

<sup>2</sup> See generally RN 15-37 (October 2015), available at [https://www.finra.org/sites/default/files/notice\\_doc\\_file\\_ref/Regulatory-Notice-15-37.pdf](https://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-15-37.pdf) (last visited Nov. 22, 2015).



their wishes. These costs and challenges are particularly enhanced for FIBA's membership, which provide services primarily to a non-U.S. resident clientele.

Instead, to ensure effective protection of the elderly and others suffering from diminished capacity from financial exploitation, better coordination among state agencies, law enforcement, adult protective services, mental health and other medical professionals, and the courts is essential to the detection and prevention of financial abuse involving seniors.

FINRA member firms located in Florida already have a mandatory requirement to report to adult protective services when they have reasonable suspicion of financial exploitation of vulnerable adults. Firms are also encouraged to file a suspicious activity report ("SAR") to alert Financial Crimes Enforcement Network ("FinCen") of activity related to financial abuse of the elderly.

FIBA has identified several significant difficulties in complying with the requirements of the Proposal, including: (1) notification to seniors before taking protective measures and possible related conflicts, (2) the amount of time afforded by the Proposal to complete complex internal investigations of financial abuse, particularly where non-U.S. residents are involved, and possible governance committee review to authorize a hold on a customer account, (3) expansion of the scope for the safe harbor provision to the firm whether it decides to withhold disbursements or not to withhold disbursements, (4) the economic burden associated with complying with the Proposal compared to the anticipated benefits, (5) the consistency of the Proposal, as drafted, with existing domestic and foreign financial privacy regulation, including the SEC's Regulation S-P and (6) special issues relating to the application of the Proposal to non-U.S. clients who qualify as "Specified Adults" under the Proposal.

### **(1) Requiring Notification to Senior Clients, and Possible Conflicts**

In a joint report, The National Senior Investor Initiative, published by the SEC's Office of Compliance Inspections and Examinations ("OCIE") and FINRA, the agencies addressed a number of key senior-related areas, including training concerning senior-specific issues and effective supervision of firm representatives who deal with senior investors.<sup>3</sup> Specifically, the report highlighted "examiner observations" and "notable practices" relating to what appears to be best practices employed at firms that can detect, mitigate, or prevent the risk of financial exploitation. For example, some of the notable practices include mandatory training on the stages of mental capacity, and solutions on handling potential diminished capacity of an investor (i.e., escalating concerns with state agencies and regulators). Particularly, as part of the examiner observations, the report emphasized that one firm's training materials on suspected senior financial abuse "encouraged the firm's representatives to ask questions, confirm who had

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<sup>3</sup> See generally The National Senior Investor Initiative (April 15, 2015), available at <http://www.finra.org/sites/default/files/SEC%20National%20Senior%20Investor%20Initiative.pdf> (last visited Nov. 22, 2015).



authorization on the account, contact the at-risk senior (separately from the suspected abuser), and escalate the matter to the appropriate supervisor.”

Proposed New Rule 2165 authorizes firms to place holds on accounts of specified adults defines “specified adults” as seniors (over age 65), or other vulnerable adults (adults with mental or physical impairment unable to protect their own interests). The Proposal requires notification of a trusted contact (or in certain circumstances a family member) after the firm has placed a hold. The notification requirement is inconsistent with best practices identified in the joint report which encouraged firm representatives to “contact the at-risk senior (separately from the suspected abuser)” before escalating to their supervisor.

The Proposal also does not take into consideration that seniors may disagree with the firm’s decision to place a hold. While age may lead to diminished capacity, neither age nor diminished capacity necessarily equate to a full lack of capacity. Seniors may not have pronounced symptoms and, as a consequence, the evaluation of diminished mental capacity of a client will in many cases be completely beyond the competence and expertise of a member firm. As such, firm representatives would be required to have sufficient knowledge of the various stages of mental capacity to identify when an elderly client’s cognitive decline reaches the level of diminished capacity. In essence, firm representatives would be required to assess their client’s capacity without the assistance of mental health professionals.

Further, Proposed New Rule 2165 requires notification of a hold to all parties authorized to transact business on the account and the trusted contact person. Admittedly, FINRA intends firms to rely on the trusted contact person in making decisions to take protective measures with regard to their clients’ interests. However, relying on a trusted contact person, who is not an authorized person, to maintain a hold on an account may conflict with the interests of the client. When firm representatives are dealing with suspected financial abuse of their elderly or vulnerable clients, they would need to ensure there is no actual or potential conflict of interest.

FIBA also seeks clarification on what actions a firm should take when it has reasonable suspicion that financial exploitation has occurred with regard to a specified adult client and the suspected perpetrator also has an account with the firm. In such a situation, would the firm have authority to place a hold on the suspected perpetrator’s account to protect the senior’s funds?

## **(2) Governance Committee Review to Take Protective Measures**

Proposed New Rule 2165 provides that a Qualified Person with reasonable suspicion that a financial exploitation has occurred, or is occurring, may place a hold on the specified adults account. The hold would trigger the initiation of an immediate internal investigation by the

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financial institution and an obligation to provide notice of the hold and the reason for the hold to all parties within two business days.

To achieve a balance between complying with a client's directive, protecting a specified adult that may be the subject of financial abuse, and limiting potential liability, firms may not take immediate action, resulting in postponing placement of a hold. Proposed New Rule 2165 provides firms only fifteen (15) days to complete an internal investigation to determine whether to extend the hold for an additional fifteen days. For example, complex financial exploitation cases may require more time to investigate to gather the relevant facts and circumstances, particularly when non-U.S. resident clients are involved. As such, a firm may not agree with a Qualified Person's assessment that the financial exploitation of a specified adult customer occurred, is imminent or ongoing. Under these circumstances, a senior or vulnerable client would benefit from an extension of time to complete an internal investigation and possible review by a governance committee, which would determine whether the facts and circumstances merit placing a hold on an account. In this regard, consideration should be given by FINRA to excepting non-U.S. resident clients from the coverage of the Proposal or to establishing a different process, including longer time periods, for application of the Proposal to non-U.S. resident seniors.

### **(3) Scope of the Safe Harbor**

The Supplementary Material to proposed Rule 2165 indicates that Rule 2165 "provides members with a safe harbor when they exercise discretion in placing temporary holds on disbursements of funds or securities from the Account of a Specified Adult", as defined in the Rule. The Supplementary Material further indicates that the "Rule does not require members to place temporary holds on disbursement of funds or securities from the Account of a Specified Adult". However, notwithstanding its direct statement that temporary holds are not required, the Supplementary Material does not clearly or expressly extend the safe harbor available for temporary holds to decisions by members that a temporary hold is not appropriate under the circumstances.

The safe harbor also does not explicitly extend to the investigatory and due diligence process leading to the decision-making required by the Proposal, which under the definition of "financial exploitation" contained in proposed Rule 2165 would require the assessment by member firms of powers of attorney and guardianships; matters which require legal and judicial expertise well beyond the competence of member firms. Moreover, determinations by member firms that a trusted contact person is engaged in financial exploitation of a senior are also beyond the express coverage of the safe harbor.

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So long as members are charged with the burdensome and potentially difficult task of determining whether a temporary hold is or is not appropriate in accordance with proposed Rule 2165's requirements, all decisions of members made in good faith (as well as the investigation and due diligence process leading to such decisions) pursuant to Rule 2165 should be directly and explicitly protected by the safe harbor, irrespective of whether the decision of the member following due diligence and investigation is that the placing of a hold, or the release of funds or securities, is the appropriate course of action. Any approach other than explicitly extending the safe harbor to both the decision to place a hold and the decision not to do so, as well as the process of due diligence and investigation leading to such decisions, could have the perverse consequence of incentivizing members to place holds even when to do so would not be in the interests of the Specified Adult or such Adult's family and/or beneficiaries.

#### **(4) Reimbursement of Costs and Expenses**

The proposed amendments to Rule 4512 and proposed Rule 2165 will subject members to significant costs; not only for matters relating to the identification of a trusted contact person under Rule 4512 and the due diligence and investigation associated with the placement of temporary holds under Rule 2165 but also the establishment and maintenance of written supervisory procedures and the development of training policies and programs required under the Supplementary Material to proposed Rule 2165.

It is questionable whether the material costs associated with compliance with the Rule proposal will be worth any anticipated benefits, particularly since members are not expert in matters of competence of seniors and since the effective investigation of the occurrence of financial exploitation of a senior could be time consuming, difficult, and extremely expensive. Although it might be reasonable to expect members to absorb the costs of the development of policies and procedures and training programs required by the Rule proposal, it does not seem at all reasonable to require members to absorb the costs associated with the due diligence and investigation needed to determine if a temporary hold is appropriate and, if made, whether it should be extended. Reasonable costs associated with those due diligence and investigatory processes, including responding to inquiries of the trusted contact person, family members, and/or other interested parties, should be borne by the accountholder and be chargeable against the relevant account(s).

#### **(5) Inconsistency with Financial Privacy Regulation**

The Proposal contemplates the disclosure of confidential financial information of seniors to their trusted contact persons, without clearly specifying the types of confidential information that may be disclosed. As drafted, such disclosures may run afoul of U.S. and foreign laws and regulations protecting the confidentiality of seniors' confidential financial information held by member firms, including Regulation S-P promulgated by the SEC.

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**(6) Special Considerations for Non-U.S. Seniors**

The time periods and other requirements of the Proposal are unduly burdensome for member firms with a primarily domestic client base, but the burdens are magnified for member firms that primarily serve non-U.S. clients. Such clients may be subject to different laws in their home countries governing matters such as mental and physical impairment and guardianships. Delegation of power to a trusted contact that is not court appointed, as contemplated by the Proposal, may be restricted under non-U.S. law. Moreover, non-U.S. clients of member firms who are Specified Adults will likely designate trusted contacts who are not U.S. persons, and who have non-U.S. person family members, leading to increased costs and difficulties associated with contacting such persons within the time frames provided under the Proposal.

Consequently, FINRA should reconsider the application of the Proposal to Specified Adults who are not U.S. persons. In this regard, non-U.S. persons might be excepted entirely from the coverage of the Proposal or, at a minimum, a separate process should be developed and implemented for the application of the Proposal to such non-U.S. person clients.

We appreciate the opportunity to comment on the proposal. Please feel free to contact me at **(David Schwartz telephone number)** or [dschwartz@fiba.net](mailto:dschwartz@fiba.net), if you have any questions concerning these comments or would like to discuss these comments further.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David Schwartz", with a stylized flourish at the end.

David Schwartz  
President and CEO  
FIBA

Copies to: Mr. Fernando Capablanca  
Ms. Patricia Hernandez  
Mr. Jorge Riera  
Mr. Bryan Wells