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November 28, 2016

**VIA ELECTRONIC SUBMISSION**

Brent J. Fields, Secretary  
Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549-1090

**Re: File Number SR-FINRA-2016-039: Amendment to Rule 4512 (Customer Account Information) and Adoption of Rule 2165 (Financial Exploitation of Specified Adults)**

Dear Mr. Fields:

The Investor Rights Clinic at the Elisabeth Haub School of Law at Pace University, operating through John Jay Legal Services, Inc. (“PIRC”),<sup>1</sup> welcomes the opportunity to submit this comment letter regarding FINRA’s proposal to amend Rule 4512 (Customer Account Information) and adopt Rule 2165 (Financial Exploitation of Specified Adults). While PIRC supports FINRA’s proposed amendment to Rule 4512 to require members to obtain the name of and contact information for a trusted contact person, we believe the rule should provide explicit guidelines for obtaining this information. PIRC also supports FINRA’s effort in proposed Rule 2165 to protect vulnerable customers by placing temporary holds on disbursements of funds or securities where a member has a reasonable belief of financial exploitation. However, PIRC believes that the best way to accomplish this goal would be to make such temporary holds mandatory rather than permissive. In the absence of mandatory temporary holds, we support FINRA’s proposed rule to allow discretionary holds on disbursements with some suggested revisions.

**I. Trusted Contact Person: Rule 4512 (Customer Account Information)**

FINRA acknowledges that financial exploitation of seniors is a growing and serious problem. In an effort to protect vulnerable investors, FINRA proposes requiring members, through “reasonable efforts,” to obtain the contact information for a trusted contact person for a

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<sup>1</sup> PIRC opened in 1997 as the nation’s first law school clinic in which law students, for academic credit and under close faculty supervision, provide pro bono representation to individual investors of modest means in arbitrable securities disputes. See Barbara Black, *Establishing A Securities Arbitration Clinic: The Experience at Pace*, 50 J. LEGAL EDUC. 35 (2000); see also Press Release, Securities Exchange Commission, SEC Announces Pilot Securities Arbitration Clinic To Help Small Investors - Levitt Responds To Concerns Voiced At Town Meetings (Nov. 12, 1997), available at <http://www.sec.gov/news/press/pressarchive/1997/97-101.txt>.

non-institutional customer's account and, under certain circumstances, to contact this person and "disclose information about the customer's account to address possible financial exploitation, to confirm the specifics of the customer's current contact information, health status, or the identity of any legal guardian, executor, trustee or holder of a power of attorney, or as otherwise permitted by Rule 2165."<sup>2</sup> PIRC generally supports this provision, but recommends that FINRA refine some of its terms to provide for a more effective application of the rule.

Regarding new accounts, the proposed Supplementary Material to Rule 4512 provides that "[t]he absence of the name of or contact information for a trusted contact person shall not prevent a member from opening or maintaining an account for a customer, provided that the member make *reasonable efforts* to obtain the name of and contact information for a trusted contact person."<sup>3</sup> Regarding current accounts, the proposed Supplementary Material to Rule 4512 states: "With respect to any account subject to the requirements of SEA Rule 17a-3(a)(17) to periodically update customer records, a member shall make *reasonable efforts* to obtain or, if previously obtained, to update where appropriate the name of and contact information for a trusted contact person consistent with the requirements of SEA Rule 17a-3(a)(17)."<sup>4</sup>

The rule proposal suggests that merely asking the customer to provide a trusted contact person's name and contact information would suffice as reasonable efforts.<sup>5</sup> PIRC believes that the rule should require more explicit documentation and shorter timeframes to set a minimum standard for collecting this information, as described below.

First, PIRC believes that if a customer refuses to provide the member with the name of a trusted contact person, FINRA should require members to maintain records documenting the attempt and the refusal. This will provide for a balance for both parties. The customers will still have the protection that the rule provides, and members will have documented proof of any refusals. Second, PIRC recommends that FINRA establish a shorter specific recurring timeframe, such as annually, during which members must reach out to their current non-institutional customers to obtain trusted contact person information.

Finally, PIRC suggests that the rule specify the minimum trusted contact person information the members must obtain from their customers to establish uniformity among members. As proposed, the rule is silent on the minimum information that members need to retrieve for a trusted contact person. Instead, it repeatedly uses the phrase, "the name of and contact information of a trusted contact person." The rule should explicitly state that member firms retrieve – in addition to a name – a telephone number, mailing address, and an email address for a trusted contact person. Members could easily obtain this information through the documentation given to the customer when he or she opens a new account as part of the account opening process, which should not substantially increase costs to members. Furthermore, PIRC suggests adding the trusted contact person information to FINRA's New Account Application

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<sup>2</sup> *File Number SR-FINRA-2016-039* (Filed with the Securities and Exchange Commission) (Nov. 1, 2016) at 82-83 (Text of Proposed Rule 4512, Supplementary Material .06 Trusted Contact Person (a)).

<sup>3</sup> *Id.* at 413 (Text of Proposed Rule 4512, Supplementary Material .06 Trusted Contact Person (b)) (emphasis added).

<sup>4</sup> *Id.* (Text of Proposed Rule 4512, Supplementary Material .06 Trusted Contact Person (c)) (emphasis added).

<sup>5</sup> *Id.* at 83.

Template. For current accountholders, PIRC suggests sending this form annually, as described above. Additionally, PIRC believes that members should also ask for the nature of the relationship between the trusted contact person and the customer. Seniors are often at risk from financial exploitation from relationships such as their spouses, relatives, or other caregivers. Understanding the nature of the relationship between the customer and the trusted contact person may help with future investigations, as this information could assist firms in determining whether the trusted contact person could be the abuser in the senior's financial exploitation.

## **II. Temporary Hold on Disbursement of Funds or Securities: Rule 2165 (Financial Exploitation of Specified Adults)**

Proposed Rule 2165 is designed to protect the growing population of vulnerable adults from financial exploitation. As proposed, the rule would allow a member to place a temporary hold on disbursements where it has a reasonable belief that financial exploitation has occurred, is occurring, has been attempted, or will be attempted. PIRC strongly supports a rule to protect vulnerable customers; however, we believe that some adjustments need to be made in order to ensure members actually implement the investor protections afforded by this rule.

### **A. Definition of Specified Adult**

Rule 2165's application is limited to a narrow group of customers, defined by FINRA as "Specified Adults." Proposed Rule 2165 defines "Specified Adult" as "(A) a natural person age 65 and older; or (B) a natural person age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests."<sup>6</sup> PIRC recommends expanding the definition of "Specified Adult" to include other populations that are vulnerable to financial exploitation by adding another subsection, which would provide: "(C) a natural person who, due to the facts and circumstances known to the member, is vulnerable to financial exploitation."<sup>7</sup> PIRC believes that the current definition of "financial exploitation" is sufficiently tailored to prevent the rule from being applied too broadly because it allows a member to exercise its judgment of the circumstances that aroused suspicion. Furthermore, members who place temporary holds on disbursements are required by proposed Rule 2165 to have supervisory policies and procedures in place related to temporary holds. Members can tailor the supervisory policies and procedures so that protecting these additional customers is not overly burdensome for members. This would help ensure that all persons who are vulnerable to financial exploitation are protected by the rule.

Alternatively, if FINRA does not expand the definition of "Specified Adult," it can modify Supplementary Material .03 to explicitly protect other vulnerable customers. It currently

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<sup>6</sup> *Id.* at 414 (Text of Proposed Rule 2165(a)(1)).

<sup>7</sup> If FINRA does not expand the definition to include subsection (C), PIRC recommends changing subsection (B) to conform with the definition of "Vulnerable Adult" used in Delaware's Chapter 39, Adult Protective Services § 3910 Duty to Report. Delaware's definition of "Vulnerable Adult" is "a person 18 years of age or older who, by reason of isolation, sickness, debilitation, mental illness or physical, mental or cognitive disability, is easily susceptible to abuse, neglect, mistreatment, intimidation, manipulation, coercion or exploitation. Without limitation, the term 'vulnerable adult' includes any adult for whom a guardian or the person or property has been appointed." Del. Code Ann. tit. 11, § 1105. PIRC believes FINRA can add the standard "the member reasonably believes" to adapt this definition to the Rule's purpose.

specifies that “a member’s reasonable belief that a natural person age 18 and older has a mental or physical impairment that renders the individual unable to protect his or her own interests may be based on the facts and circumstances observed in the member’s business relationship with the natural person.”<sup>8</sup> The Supplementary Material should include an express statement that if a member notices customer behavior that points to a reasonable belief of financial exploitation, the member can consider that customer unable to protect his or her own interests under the definition’s subsection (B). If a member has a reasonable belief that any customer is being financially exploited, it should be permitted (or required, as discussed below) to place a temporary hold on disbursements rather than limiting the rule’s application to a narrow group of customers.

## **B. Mandatory Temporary Holds on Disbursements**

PIRC supports proposed Rule 2165’s temporary hold on disbursements. As currently written, the proposed rule *permits* a member to place a temporary hold on disbursements of funds or securities from the account of a customer where a member reasonably believes that financial exploitation has occurred, is occurring, has been attempted, or will be attempted. It also permits an extension of that temporary hold if an internal review of the facts and circumstances supports the member’s reasonable belief. However, as proposed, members are not *required* to place a temporary hold on suspicious disbursements. PIRC believes FINRA should require members to impose this temporary hold rather than making it discretionary. Without an obligation to place temporary holds on disbursements of funds or securities, proposed Rule 2165 will have insufficient force. A discretionary rule that permits rather than requires temporary holds allows members to avoid having to use the rule, rather than protecting customers by compelling members to use the temporary hold afforded by the rule. PIRC believes all members should be required to create policies and procedures to comply with the proposed rule so that members cannot circumvent using the protection afforded by the proposed rule. Additionally, members may be hesitant to allow their employees to place temporary holds on disbursements to avoid any conflicts that could potentially arise if the hold is not mandatory. Discretionary temporary holds create a rule that has no force.

Members may be concerned about whether the rule’s safe harbor provision would protect them if the temporary hold was made mandatory instead of permissive. If proposed Rule 2165 created an obligation to temporarily withhold disbursements when there is a reasonable belief that financial exploitation has occurred, is occurring, has been attempted, or will be attempted, the safe harbor provisions provided by Supplementary Material from FINRA Rules 2010 (Standards of Commercial Honor and Principles of Trade), 2150 (Improper Use of Customers’ Securities or Funds; Prohibition Against Guarantees and Sharing in Accounts), and 11870 (Customer Account Transfer Contacts)<sup>9</sup> would still apply. The safe harbor provided in Supplementary Material .01 simply allows members who exercise their discretion in placing temporary holds protection from potentially violating the other FINRA rules. Members would still have this safe harbor because changing the temporary hold from permissive to mandatory would not have any effect on that protection.

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<sup>8</sup> *File Number SR-FINRA-2016-039* (Filed with the Securities and Exchange Commission) (Nov. 1, 2016) at 418 (Text of Proposed Rule 2165, Supplementary Material .03 Reasonable Belief of Mental or Physical Impairment).

<sup>9</sup> *Id.* at 10-11.

### **C. Member Policies and Procedures**

FINRA's proposed Rule 2165(c)(1) requires that "a member relying on this Rule shall establish and maintain written supervisory procedures reasonably designed to achieve compliance with this Rule, including, but not limited to, procedures related to the identification, escalation and reporting of matters related to the financial exploitation of Specified Adults." PIRC supports this requirement, but is concerned that the rule is unclear as to whether Rule 2165 allows a member to use the safe harbor provision of the rule if it does not establish and maintain written supervisory procedures. In order to resolve this ambiguity and ensure that members will act when there is a reasonable belief of financial exploitation, the rule should expressly state that every member is required to have written supervisory policies and procedures to comply with the proposed rule and to be entitled to the safe harbor.

FINRA should require that these policies and procedures also include details on how members will conduct internal reviews of facts and circumstances that caused the member to have a reasonable belief that financial exploitation of the customer has occurred, is occurring, has been attempted, or will be attempted, as well as how members will provide notification to customers and the trusted contact person. Even if FINRA does not mandate temporary holds, a member should have policies and procedures in place to enforce this rule if it is free to exercise its discretion. Furthermore, PIRC believes no member should be allowed to establish policies and procedures preventing its employees from placing a temporary hold if they have a reasonable belief that financial exploitation has occurred, is occurring, has been attempted, or will be attempted. Employees of members should be able to exercise their discretion to protect vulnerable customers without being blocked by member policies and procedures.

### **D. Extension of Temporary Hold**

Proposed Rule 2165 states that the temporary hold cannot be longer than 15 business days from the date of the initial hold. PIRC believes that, with proper written supervisory policies and procedures, an initial 15 business day temporary hold on disbursements is sufficient time for a member to notify the customer and trusted contact person as well as to conduct an internal review of the facts and circumstances that led to the reasonable belief that financial exploitation has occurred, is occurring, has been attempted, or will be attempted. FINRA initially proposed in Regulatory Notice 15-37 that an extension of the temporary hold may be up to 15 business days after the initial period but revised that time period in SR-FINRA-2016-039<sup>10</sup> to now permit the member to extend the temporary hold for only an additional 10 (vs. 15) business days if "the member's internal review of the facts and circumstances supports its reasonable belief that the financial exploitation of the customer has occurred, is occurring, has been attempted or will be attempted."<sup>11</sup> PIRC strongly supports an extension of the initial 15 business day hold but believes the 10 business day extension is not a long enough extension. If an internal review supports a reasonable belief of financial exploitation, then it is likely that it will take longer than 10 days to remedy the situation. PIRC recommends that members be required to report their reasonable belief of financial exploitation to a relevant third party (as discussed

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<sup>10</sup> *Id.* at 21.

<sup>11</sup> *Id.* at 15.

below) so that official action can remedy the situation. Any third party that a member must report the financial exploitation to will likely take longer than 10 days to step in and prevent the financial exploitation. The extension of the temporary hold should be long enough for the member to make a report and for related official action to take place.

### **E. Mandatory Reporting to a Third Party**

FINRA's proposed Rule 2165 alludes to a third party being able to extend or terminate the temporary hold, but does not require members to report suspected financial exploitation to any third parties other than the trusted contact person on the account.<sup>12</sup> PIRC believes that if a member's internal review of the facts and circumstances supports the member's reasonable belief and it elects to extend the initial temporary hold on disbursements of funds or securities, the member should be required to report the suspected financial exploitation to either the relevant state securities regulator or FINRA. FINRA is creating Rule 2165, in part, to create "a uniform national standard."<sup>13</sup> The North American Securities Administrators Association ("NASAA") created a model act, the "NASAA Model Legislation or Regulation to Protect Vulnerable Adults from Financial Exploitation," and a small number of states have enacted statutes protecting vulnerable adults from financial exploitation. The NASAA model act requires 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[.]" to promptly notify the . . . commissioner of securities "when [it] reasonably believes that financial exploitation of an eligible adult may have occurred, may have been attempted, or is being attempted."<sup>14</sup> The state statutes also require members to report to the state securities commissioner.<sup>15</sup> PIRC supports a requirement to report to the state securities commissioner or FINRA, and believes the lack of a reporting requirement would render a member's extension of the temporary hold and internal investigation less effective because a third party cannot take action to protect the vulnerable adult unless notified. Adopting a reporting requirement to the state securities commissioner or FINRA should further FINRA's goal of creating a uniform national standard by aligning Rule 2165 with the model act and existing statutes that have a reporting standard.<sup>16</sup> However, we believe the focus of the report should be the bad actor rather than the vulnerable adult to alleviate any confidentiality concerns.

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<sup>12</sup> The language of proposed Rule 2165(b)(2) and (3) alludes to third party action by using the language "unless sooner terminated or extended by a state regulator or agency of competent jurisdiction or a court of competent jurisdiction." However, proposed Rule 2165(b)(1)(B) only requires a member to notify "(i) all parties authorized to transact business on the Account; and (ii) the Trusted Contact Person(s)..." *Id.* at 415-416.

<sup>13</sup> *Id.* at 82-83.

<sup>14</sup> NASAA Model Legislation or Regulation to Protect Vulnerable Adults from Financial Exploitation, NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION § 3 (2016).

<sup>15</sup> See Del. Code Ann. Tit. 31, § 3910 (2015); Mo. Rev. Stat. §§ 409.600-.630 (2015); Wash. Rev. Code §§ 74.34.215, 220 (2015); and Ind. Code Ann. § 23-19-4.1 (2016).

<sup>16</sup> The NASAA model act and state statutes also require members to report to the jurisdiction's Adult Protective Services. PIRC believes the appropriate third party to remedy financial exploitation would be a securities-related agency. Once a trusted contact person is notified, that person is most likely better equipped to determine if exploitation should be reported to Adult Protective Services.

### **III. Conclusion**

PIRC strongly supports the addition of an explicit rule for the protection of vulnerable adults against financial exploitation; however, without certain safeguards and specificity, as described above, the rule will not be as effective as it could be in protecting vulnerable adults. PIRC believes that, with the modifications we have suggested, proposed Rule 2165 and the amendment to Rule 4512 will afford strong protection to customers who are vulnerable to financial exploitation.

Respectfully yours,

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