AMERICAN CONSUMER & INVESTOR INSTITUTE

February 28, 2025

Via Email

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1700 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 24-13 (FINRA Requests Comment on the Effectiveness and Efficiency of its Requirements Relating to Day Trading)

Dear Ms. Mitchell:

The American Consumer and Investor Institute ("ACII") respectfully submits this letter in response to the request for comment in the Financial Industry Regulatory Authority, Inc.'s ("FINRA") Regulatory Notice 24-13 (FINRA Requests Comment on the Effectiveness and Efficiency of its Requirements Relating to Day Trading).[1]

ACII supports FINRA's efforts to review its day trading requirements to assess their effectiveness and efficiency. FINRA's current day trading requirements are exclusionary and outdated. These rules are overly complex and unduly restrict retail investor participation in the U.S. securities markets by establishing a de facto "wealth test" to trade securities and strip individuals of the autonomy to make their own financial decisions. Investing in the stock market is an important source of wealth generation for retail investors and should not be inhibited by unnecessary barriers to entry that make investing more difficult or expensive. Since the day trading rules were adopted in 2001, industry developments like zero commissions and fractional share investing have made the U.S. securities markets more accessible to all demographics of retail investors, and financial education and risk management tools that facilitate informed investments are more widely available than ever. In recognition of the many changes to the securities markets since these rules were adopted, FINRA should overhaul its day trading rules to better promote financial inclusion and retail investor access. ACII believes that these goals can be achieved by eliminating the trade-based trigger for pattern day trader status and the minimum equity requirement in favor of a disclosure-based framework.

I. Background on FINRA Day Trading Requirements

Under FINRA rules, "day trading" generally refers to where an individual buys and sells the same security on the same day.[2] Day trading is not permitted in a cash account where all securities purchased must be paid for in full before they are sold. Instead, day trading must

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[1] https://www.finra.org/rules-guidance/notices/24-13 (the "Notice").
[2] *See* FINRA Rule 4210(f)(8)(B).

occur in a margin account. An investor is considered a "pattern day trader" if they execute four or more day trades within five business days provided that the number of day trades represents more than 6 percent of their total trades in the margin account for that same five business day period.

An investor that is identified as a pattern day trader must maintain minimum equity of \$25,000[3] in their account on any day that the investor day trades and cannot trade in excess of their "day-trading buying power," which is generally up to four times the "maintenance margin excess" (i.e., the amount by which the equity in the account exceeds the required margin) as of the close of business of the prior day. If the account falls below the \$25,000 minimum equity requirement, the investor is not permitted to day trade until the account is restored to the \$25,000 minimum equity level. If an investor exceeds the day-trading buying power limitation, a firm will issue a day-trading margin call, after which the investor will then have, at most, five business days to deposit funds to meet the call. Until the margin call is met, the account will be restricted to a day-trading buying power of only two times maintenance margin excess based on the investor's daily total trading commitment. If the day-trading margin call is not met by the deadline, the account will be further restricted to trading only on a cash available basis for 90 days or until the call is met.

FINRA adopted the day trading requirements in 2001, seeking "to reduce the risk of financial loss by pattern day traders" and "protect the safety and soundness of member firms and ensure the overall financial well-being of the securities markets."[4] While these objectives are admirable, the resulting rules were an overreaction to the market downturn of the time and resulted in arbitrary limitations on trading for investors designated (or not wanting to be designated) pattern day traders. Moreover, changes to the securities markets since then have made it easier to be designated as a pattern day trader, subjecting investors to unnecessarily burdensome requirements accompanying that designation.

II. FINRA Should Amend the Day Trading Rules to Promote Investor Choice and Financial Inclusion by Eliminating the Trade-Based Trigger for Pattern Day Trader Status and the Minimum Equity Requirement in Favor of Disclosure

Trading in the stock market has changed substantially since 2001 when FINRA adopted its day trading requirements. These changes warrant a substantial overhaul to FINRA rules that ACII believes should focus on providing retail investors with tools to understand their investments and freedom to make their own financial decisions. Any day trading rules that FINRA seeks to adopt should focus on disclosure of the relevant risks and requirements rather than restriction. Disclosure is a proven way to address investment risks that has been relied on since the federal securities laws were first enacted. Accordingly, FINRA should eliminate the day trade count as the trigger for pattern day trader status. Instead, FINRA should allow

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[3] In contrast, a margin account that is not classified as a pattern day trader is subject to a minimum equity requirement of \$2,000. *See* FINRA Rule 4210(b).

[4] Self-Regulatory Organizations; New York Stock Exchange, Inc., and National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Changes Relating to Margin Requirements for Day Trading; Notice of Filing and Order Granting Accelerated Approval of Amendments No. 1 to Each Proposed Rule Change, 66 Fed. Reg. 13608, 13610, 13617 (Mar. 6, 2001).

investors to opt in to designation as a pattern day trader. FINRA also should eliminate the $25,000 minimum equity requirement for pattern day traders.

The day trading rules were subject to considerable criticism from commenters at the time they were adopted in 2001. Even at that time, commenters considered the $25,000 minimum equity requirement to be "paternalistic."[5] The threshold for being designated as a pattern day trader also was set arbitrarily. For example, the four trades per day threshold is much lower than the examples used by the Securities and Exchange Commission ("SEC") in discussing day trading around the same time.[6] How this trigger is applied by brokerage firms can be different, leading to investor confusion when they unintentionally trigger pattern day trader status and potentially have their account restricted. Due to the breadth of this trigger, a large swath of dissimilar investors can be categorized as pattern day traders despite engaging in trading with radically different risk profiles. Investors may change their behavior to avoid that trigger or encounter restrictions that result in losing out on potential investing opportunities or subjecting themselves to additional risks by holding positions longer than they otherwise would. Moreover, once an investor is designated as a pattern day trader, brokers generally provide only one "reset" for the account to remove that designation. This results in investors either wasting time and money to move from broker to broker to avoid pattern day trader restrictions or being stuck with those restrictions permanently, even if they do not intend to engage in day trading. Consequently, FINRA rules have the effect of preventing day trading and potentially creating financial risk of loss, even if that was not FINRA's intent. These criticisms are more acute now than ever given changes to the U.S. securities markets over the past 25 years.

Retail investing has grown across all demographics since 2001.[7] At that time, high commissions and whole share investing were the norm and resulted in high trading costs and increased capital required to make an investment. These high costs erected barriers to investing in the stock market that made it difficult for many retail investors to meaningfully participate in an important source of wealth generation.[8] Intervening developments like zero commission trading and fractional share trading programs have made investing more accessible by decreasing costs and the minimum capital required to invest. Now, lower income individuals are participating in the stock market in record numbers, but still they are not granted the same rights as wealthier individuals. FINRA's current day trading rules exclude lower-income investors from using certain investment products and trading strategies that instead are reserved for the

[5] *Id*. at 13612.
[6] *See* SEC, Office of Compliance Inspections and Examinations, *Special Study: Report of Examinations of Day-Trading Broker-Dealers* (Feb. 25, 2000), https://www.sec.gov/news/studies/daytrading.htm ("SEC Staff Report") ("For example, a day trader who makes 50 trades per day" and "such as 20 or 50 trades per day").
[7] *See, e.g.*, Nick Einhorn, Jill E. Fisch, Sergio A. Gramitto Ricci, Monique Le & Christina M. Sautter, *The Retail Investor Report*, PUBLIC.COM (2023), *available at*: https://irlaw.umkc.edu/faculty_works/928 ("By 2021, retail investors comprised 25% of total equities trading volume, nearly double the percentage reported a decade prior.").
[8] Tessa Campbell and Jake Safance, *Average Stock Market Return: A Historical Perspective and Future Outlook*, BUSINESS INSIDER (Jan. 2, 2025), https://www.businessinsider.com/personal-finance/investing/average-stock-market-return ("According to DQYDJ, since the S&P 500 was introduced in 1957, its annual return, including dividends, has averaged over 10% through the end of 2024.").

wealthy. Removing barriers to entry that disenfranchise investors—like the current day trading rules—is necessary to achieve ACII's goals of financial inclusion and investor choice.

FINRA's day trading requirements are not suited to today's market structure. Fractional share investing has made it much easier to be labelled a pattern day trader because it offers lower priced trades. This can result in investors even with very low risk profiles being designated as pattern day traders. However, there is no reason that an investor—for example, that trades low priced fractional shares of stock a few times a day—needs to maintain $25,000 minimum equity. This minimum equity requirement is arbitrary and unnecessarily burdens retail investors, who may not want to (or be able to) park a significant amount of capital in their brokerage account that could be more productive elsewhere. Meanwhile, zero commission trading has reduced costs associated with day trading. Whereas in 2000, when day trading requirements were under consideration, "[d]ay-trading firms generally charge[d] commissions of between $15-$25 per trade" in addition to "a substantial amount for additional services," today's investors often pay no commissions to trade.[9] This substantially reduces the expenses and the breakeven point for investors engaged in trading. As a result, the potential financial risks that animated FINRA's adoption of its day trading rules are less relevant today, and the limitations placed on investors designated as pattern day traders are no longer reasonable.

The investment products available to retail investors also have changed. New products that FINRA recognizes "are designed for short-term trading"[10]—like leveraged and inverse ETFs—have received regulatory approvals and grown in popularity. These products are not designed to be held long term due to their daily rebalancing mechanisms and higher fees but provide important opportunities for investors seeking to take a position against a market, to increase their exposure to a product, or to hedge risk without using derivatives or leverage. FINRA's existing day trading rules effectively prevent certain investors from using these products, as designed, because they would label investors as pattern day traders and subject them to the onerous minimum equity and buying power requirements. It is hard to justify prohibitions on using these products effectively when the SEC has approved them for retail consumption.

Retail investors should be able to make their own financial decisions. Today, investors are equipped with a broad array of financial education tools that can guide their investment decisions. Governmental and nongovernmental organizations, including the SEC, FINRA, brokerage firms, and others, provide a variety of tools that help to educate investors.[11] Technological advancements also have enhanced brokers' and investors' ability to manage trading risk. Brokers have developed risk management tools to manage their own financial exposure from customer day trading in real time. Brokers also offer advanced tools that provide investors with information to manage their trading in real time. As a result, investors can make more informed decisions about their trades, and the risk that they will experience financial losses due to lack of information is substantially mitigated. It is important that retail investors

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[9] SEC Staff Report.
[10] *See* Notice.
[11] *See, e.g.*, https://www.investor.gov/; https://www.finrafoundation.org/.

understand the risks involved in day trading, but they can make their own informed decisions with the abundance of information and tools at their disposal today.

III. Conclusion

ACII appreciates the opportunity to provide its views on FINRA's day trading rules. Retail investors demand full participation in the securities markets. In their current state, FINRA's day trading rules unjustifiably and arbitrarily restrict retail investors from trading. The current rules were contested at the time of their adoption, and numerous intervening developments have only further mitigated the risks the day trading rules were designed to address. Accordingly, FINRA should amend the day trading rules to remove impediments to investors and promote investor choice by eliminating the trade-based threshold for pattern day traders and the $25,000 minimum equity requirement.

Sincerely,

Blaine Luetkemeyer
Chief Executive Officer
American Consumer and Investor Institute