

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-92225; File No. SR-FINRA-2021-016)

June 22, 2021

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change to Amend Rule 2165 (Financial Exploitation of Specified Adults)

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on June 9, 2021, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend Rule 2165 (Financial Exploitation of Specified Adults) to permit member firms to: (1) extend a temporary hold on a disbursement of funds or securities or a transaction in securities for an additional 30-business days if the member firm has reported the matter to a state regulator or agency or a court of competent jurisdiction; and (2) place a temporary hold on a securities transactions where there is a reasonable belief of financial exploitation.

The text of the proposed rule change is available on FINRA’s website at <http://www.finra.org>, at the principal office of FINRA and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Protection of Senior Investors

The protection of senior investors is a top priority for FINRA. FINRA has prioritized protecting senior investors and addressed financial exploitation of senior investors in numerous ways, including:

- Identifying senior investor issues as an examination priority;³
- Launching the dedicated FINRA Securities Helpline for Seniors[®]—available at 844-57-HELPS—to provide senior investors and their family members with a supportive place to get assistance from specially trained FINRA staff related to concerns they have with their brokerage accounts and investments;⁴
- Creating national standards that give member firms tools—including permitting firms to place temporary holds on disbursements when they have a reasonable

³ See 2019 Risk Monitoring and Examination Priorities Letter (January 2019) available at <https://www.finra.org/industry/2019-annual-risk-monitoring-and-examination-priorities-letter>.

⁴ See <http://www.finra.org/investors/highlights/finra-securities-helpline-seniors>.

belief of financial exploitation and requiring firms to request information from customers about a trusted contact—to address suspected financial exploitation of senior investors and other vulnerable adults (i.e., FINRA Rules 2165 and 4512 (Customer Account Information));⁵

- Collaborating with the North American Securities Administrators Association (NASAA) and the SEC to address senior investor protection, including issuing a Senior Safe Act Fact Sheet designed to raise awareness among member firms, investment advisers and transfer agents about the Act and its immunity provisions;⁶
- Issuing alerts and articles educating investors about important issues and highlighting risks facing senior investors;⁷
- Conducting and funding research on senior investors and financial fraud, and engaging with national, state and grassroots partners to develop and distribute fraud prevention resources, educate consumers, and provide training for law enforcement professionals, victim advocates, and other people on the front lines of fighting financial fraud;

⁵ See Regulatory Notice 17-11 (March 2017).

⁶ See http://www.finra.org/sites/default/files/senior_safe_act_factsheet.pdf.

⁷ See, e.g., articles such as Protecting Seniors from Financial Exploitation; Investor Alerts such as Power of Attorney and Your Investments—10 Tips; Plan for Transition: What You Should Know About the Transfer of Brokerage Account Assets on Death; Seniors Beware: What You Should Know About Life Settlements; and FINRA’s Retirement webpage for investors.

- Issuing Regulatory Notices emphasizing member firms’ obligations to senior investors and providing guidance on how to fulfill those obligations;⁸ and
- Bringing disciplinary actions for misconduct against senior investors.⁹

Retrospective Review

In August 2019, FINRA launched a retrospective review to assess the effectiveness and efficiency of its rules and administrative processes that help protect senior investors from financial exploitation. The retrospective review process has two phases: the assessment phase and the action phase.¹⁰ During the assessment phase, FINRA first sought comment in Regulatory Notice 19-27 (August 2019) on several questions with respect to addressing financial exploitation and other circumstances of financial vulnerability for senior investors. FINRA received 22 comment letters to Regulatory Notice 19-27.¹¹

⁸ See, e.g., Regulatory Notice 07-43 (Sept. 2007) (reminding member firms of their obligations relating to senior investors and highlighting industry practices to serve these customers); Regulatory Notice 09-42 (July 2009) (reminding member firms of their obligations with variable life settlement activities); Regulatory Notice 11-52 (Nov. 2011) (reminding member firms of their obligations regarding the supervision of associated persons using senior designations); Regulatory Notice 16-12 (Apr. 2016) (providing guidance on member firm responsibilities for sales of pension income stream products); and Regulatory Notice 17-11 (Mar. 2017) (discussing new senior rules and potential financial exploitation of seniors).

⁹ See, e.g., John W. Cutshall, Order Accepting Offer of Settlement, Case ID 2014041590801 (April 11, 2019); Steven Anthony Olejniczak, Letter of Acceptance, Waiver and Consent, Case ID 2016050107901 (May 8, 2017).

¹⁰ The stakeholders who provided input during the assessment phase of the retrospective review are collectively referred to herein as the “Retrospective Review Stakeholders.”

¹¹ See Letter from Megan Valent, Legal Intern, and Teresa J. Verges, Director, University of Miami School of Law, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 1, 2019; Letter from Jennifer L. Szaro, Lara May & Associates, LLC, and Robert L. Hamman, President, First Asset Financial Inc., to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 4, 2019; Letter from William A. Jacobson, Esq., Clinical Professor of Law and Director, Securities Law Clinic Cornell Law School, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA,

In addition, FINRA obtained input from several advisory committees comprising member firms of different sizes and business models, investor protection advocates, member firms, and

dated Oct. 7, 2019; Letter from Kathleen Quinn, Board President, National Adult Protective Services Association, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 7, 2019; Letter from Joe Snyder, Chair, Philadelphia Financial Exploitation Task Force dated Oct. 7, 2019; Letter from Seth A. Miller, General Counsel, Executive Vice President, and Chief Risk Officer, Cambridge Investment Research, Inc., to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Eric Arnold, Clifford Kirsch and Holly Smith of Eversheds Sutherland on behalf of the Committee of Annuity Insurers, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Christopher W. Bok, Director, Financial Information Forum, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Marc Fitapelli, Esq., Fitapelli Kurta, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Robin M. Traxler, Senior Vice President, Policy & Deputy General Counsel, Financial Services Institute, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Maureen K. Paparo, Legal Intern, Lincoln Square Legal Services, Inc., to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Courtney Rogers Reid, Lead Counsel, Broker-Dealer and Investment Adviser Practice Group, MML Investors Services, LLC, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Christopher Gerold, President, NASAA, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Nancy Brown, President and Co-Chair, and Dian VanderWell, Opportunity Alliance Nevada, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Christine Lazaro, President, and Samuel B. Edwards, Executive Vice President, Public Investors Advocate Bar Association, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Lisa J. Bleier, Managing Director, SIFMA, dated Oct. 8, 2019; Letter from Christine Lazaro, Professor of Clinical Legal Education and Director, St. John's University School of Law Securities Arbitration Clinic, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Alice L. Stewart, Director, and Rachael T. Shaw, Adjunct Professor, University of Pittsburgh School of Law – Securities Arbitration Clinic, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Ron Long, Head of Elder Client Initiatives Center of Excellence, Wells Fargo & Company, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Erin K. Lineham, Associate General Counsel - Compliance, Raymond James & Associates, Inc., to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 29, 2019; Letter from Marin E. Gibson, Managing Director and Associate General Counsel, SIFMA, dated Nov. 15, 2019; Letter from Anonymous dated Feb. 26, 2020.

trade associations. FINRA also obtained the perspective of its operating departments that touch the rules and their administration. Moreover, FINRA considered examination observations and findings involving senior issues. In this regard, FINRA previously had identified as an examination priority reviewing member firms' controls regarding Rule 2165, to the extent firms anticipated using the rule's safe harbor, and Rule 4512's trusted-contact provision.¹² As part of these reviews, FINRA looked at whether member firms had clearly defined policies and procedures and sought information about firms' early experiences with these provisions.¹³

Finally, FINRA developed an anonymous survey that was distributed to all member firms in the first quarter of 2020. The purpose of the survey was to collect information in order to validate the feedback received and to provide an additional opportunity for all member firms to provide their views.¹⁴

The review indicated that FINRA's steps to protect seniors have provided helpful and effective tools in the fight against financial exploitation, but it also suggested some additional tools, guidance and rule changes. In October 2020, FINRA published Regulatory Notice 20-34 (October 2020): (1) summarizing the retrospective rule review process, including the predominant themes that emerged from Retrospective Review Stakeholder feedback; (2) seeking comment on proposed amendments to Rule 2165 to further address suspected financial

¹² See 2019 Annual Risk Monitoring and Examination Priorities Letter (Jan. 22, 2019).

¹³ See id.

¹⁴ Survey respondents were permitted to skip survey questions. Information in this proposed rule change regarding the percentage of survey respondents for a particular question reflects the percentage of respondents for that question, not the percentage of respondents for the survey as a whole. Approximately 190 responses were received for each top-level (non-nested) question. Therefore, unless indicated otherwise, the reader can assume that the percentages are based on approximately 190 responses.

exploitation of senior investors and other specified adults; and (3) providing guidance to aid member firms and senior investors and other specified adults.¹⁵

Rule 2165

Rule 2165 is the first uniform national standard for placing temporary holds on disbursements to address suspected financial exploitation.¹⁶ Rule 2165 permits a member firm to place a temporary hold on a disbursement of funds or securities from the account of a “specified adult”¹⁷ customer when the firm reasonably believes that financial exploitation of that adult has occurred, is occurring, has been attempted or will be attempted. Prior to the adoption of Rule 2165, some member firms expressed concern that placing a temporary hold on suspicious disbursements was not explicitly permitted by FINRA rules.

To address these concerns, Rule 2165 provides member firms and their associated persons with a safe harbor 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 Contracts) when

¹⁵ The proposed amendments to Rule 2165 set forth in Regulatory Notice 20-34 are referred to herein as the “Notice 20-34 Proposal.”

¹⁶ See Securities Exchange Act Release No. 79964 (Feb. 3, 2017), 82 FR 10059 (Feb. 9, 2017) (Notice of Filing of Partial Amendment No. 1 and Order Granting Accelerated Approval of File No. SR-FINRA-2016-039).

¹⁷ The definition of “specified adult” in Rule 2165 covers those investors who are particularly susceptible to financial exploitation. A “specified adult” is (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. See Rule 2165(a)(1). Supplementary Material .03 to Rule 2165 provides that a member firm’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 firm’s business relationship with the person.

member firms exercise discretion in placing temporary holds on disbursements of funds or securities from the accounts of specified adults consistent with the requirements of Rule 2165.

FINRA encourages member firms to take advantage of the Rule 2165 safe harbor where there is a reasonable belief of customer financial exploitation.

Rule Safeguards

Rule 2165 also includes important safeguards that are designed to ensure that there is not a misapplication of the rule, including the requirements that:

(1) A member firm provide notification of the hold and the reason for the hold to all parties authorized to transact business on the account, including the customer and the customer's trusted contact person no later than two business days after the date that the member firm first placed the hold;¹⁸

(2) A member firm that places a hold pursuant to the rule immediately initiate an internal review of the facts and circumstances that caused the member to reasonably believe that the financial exploitation of the specified adult has occurred, is occurring, has been attempted, or will be attempted;¹⁹

(3) In addition to the general supervisory and recordkeeping requirements of FINRA Rules 3110, 3120, 3130, 3150, and Rule 4510 Series, a member relying on the rule establish and maintain written supervisory procedures reasonably designed to achieve compliance with the rule, including, but not limited to, procedures related to the identification, escalation and reporting of matters related to the financial exploitation of specified adults;²⁰

¹⁸ See Rule 2165(b)(1)(B).

¹⁹ See Rule 2165(b)(1)(C).

²⁰ See Rule 2165(c)(1).

(4) Any request for a hold be escalated to a supervisor, compliance department or legal department rather than allowing an associated person handling an account to independently place a hold;²¹

(5) A member firm relying on the rule develop and document training policies or programs reasonably designed to ensure that associated persons comply with the requirements of the rule;²² and

(6) A member firm relying on the rule retain records related to compliance with the rule, which shall be readily available to FINRA, upon request.²³

Importantly, a temporary hold pursuant to Rule 2165 may be placed on a particular suspicious disbursement(s) (e.g., a payment related to a commonly known scam, such as a lottery scam) but not on non-suspicious disbursements (e.g., a regular mortgage payment or assisted living facility payment).

Responding to Suspected Financial Exploitation

Temporary holds on disbursements have played a critical role in providing member firms a way to quickly respond to suspicions of financial exploitation before potentially ruinous losses occur for the customer. For example, FINRA's report for the five-year anniversary of the FINRA Securities Helpline for Seniors® highlights several matters that illustrate the positive

²¹ See Rule 2165(c)(2).

²² See Supplementary Material .02 to Rule 2165.

²³ See Rule 2165(d).

impact of placing temporary holds on disbursements to address financial exploitation.²⁴ The matters include temporary holds placed by member firms to prevent senior investors from losing:

- \$200,000 (representing approximately two-thirds of the investor's account) related to a Central Intelligence Agency (CIA) lawsuit scam;
- \$10,000 in a lottery scam;
- \$60,000 in a romance scam; and
- \$50,000 to financial exploitation by a brother-in-law.

Proposed Amendments to Rule 2165

The retrospective review indicated that Rule 2165 has been an effective tool in the fight against financial exploitation,²⁵ but supported amendments to permit member firms to: (1) extend a temporary hold on a disbursement of funds or securities or a transaction in securities for an additional 30-business days if the member firm has reported the matter to a state regulator or agency or a court of competent jurisdiction; and (2) place a temporary hold on a securities transaction where there is a reasonable belief of financial exploitation.

²⁴ See Protecting Senior Investors 2015–2020: An Update on the FINRA Securities Helpline for Seniors, Other FINRA Initiatives and Member Firm Practices (Apr. 2020) (Senior Helpline Anniversary Report).

²⁵ During exams in 2019 focusing on Rule 2165, FINRA observed that large firms were more likely than small firms to place temporary holds pursuant to Rule 2165. Some member firms that declined to use the safe harbor cited litigation risks associated with placing temporary holds or in evaluating whether a customer is being financially exploited. This is consistent with FINRA's survey responses with large firms indicating that they had placed a temporary hold pursuant to the rule in a significantly larger percentage than mid-size or small firms. Thirty-one survey respondents had placed a temporary hold pursuant to Rule 2165. Eighty-four percent of large firm respondents had placed a hold pursuant to Rule 2165, while only 6% of all other sized firm respondents had placed a hold pursuant to Rule 2165.

Hold Period

Rule 2165 currently allows a member firm to place a temporary hold on a specified adult customer's account for up to 25-business days if the criteria in the rule are satisfied. More specifically, the temporary hold authorized by Rule 2165 would expire not later than 15-business days after the date that the member first placed the temporary hold on the disbursement of funds or securities, unless otherwise terminated or extended by a state regulator or agency or court of competent jurisdiction.²⁶ In addition, provided that the member firm's internal review of the facts and circumstances supports its reasonable belief that the financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted, the rule permits the member to extend the temporary hold for an additional 10-business days, unless otherwise terminated or extended by a state regulator or agency or court of competent jurisdiction.²⁷

Retrospective Review Stakeholders and commenters to the Notice 20-34 Proposal generally supported extending the current 25-business day hold period to provide member firms with a longer period to resolve matters.²⁸ These Retrospective Review Stakeholders and commenters to the Notice 20-34 Proposal indicated that the current period may not be sufficient when a matter is under consideration by a state regulator, state agency or court. Notably, this view was shared by NAPSA and the Philadelphia Financial Exploitation Task Force in comments to Regulatory Notice 19-27 and the Notice 20-34 Proposal, with both commenters

²⁶ See Rule 2165(b)(2).

²⁷ See Rule 2165(b)(3).

²⁸ See, e.g., comments to the Notice 20-34 Proposal from CAI, Cambridge, Commonwealth, Edward Jones, Fidelity, FSI, IRI, Miami Investor Rights Clinic, MMLIS, NAPSA, Norcross, Philadelphia Financial Exploitation Task Force, SIFMA and Wells Fargo.

stating that adult protective services (APS) agencies, state regulators and law enforcement typically need more time to conduct thorough investigations. In contrast, in comments to Regulatory Notice 19-27 and the Notice 20-34 Proposal, NASAA supported retaining the current 25-business day period, which aligns with the hold period provided in the NASAA Model Act to Protect Vulnerable Adults from Financial Exploitation (NASAA Model Act).²⁹

During exams in 2019 focusing on Rule 2165, member firms expressed to FINRA the need for additional time to conduct investigations and resolve matters.³⁰ Member firms were asked in the survey distributed to member firms about possible impediments to resolving a matter within the current 25-business day hold period provided by Rule 2165. Approximately 53% of survey respondents stated that they had been unable to resolve a matter within the 25-business day period. The most common reason was that the matter was under consideration by a state agency (such as APS) or a court. Other common reasons included: (1) the customer did not respond to inquiries from the firm; or (2) the customer did not believe that he or she was being financially exploited. For matters that took longer to resolve than the 25-business day period, approximately 35% of survey respondents indicated that it took on average 26-50 days to resolve the matter and approximately 59% of survey respondents indicated that it took on average 51-100 days to resolve the matter.

²⁹ The NASAA Model Act is available at <https://www.nasaa.org/industry-resources/senior-issues/model-act-to-protect-vulnerable-adults-from-financial-exploitation/>.

³⁰ In 2019, FINRA identified as an examination priority: (1) reviewing member firms' controls regarding their obligations under trusted contact person-related amendments to FINRA Rule 4512 and Rule 2165, to the extent that firms anticipate placing temporary holds on disbursements pursuant to the Rule 2165 safe harbor, including whether firms have clearly defined policies and procedures or practices; and (2) learning about firms' early experiences with these provisions. See 2019 Annual Risk Monitoring and Examination Priorities Letter (Jan. 22, 2019).

FINRA recognizes that placing or extending a temporary hold on a disbursement is a serious step for a member and the affected customer. While FINRA recognizes that customers may be affected by temporary holds, the costs of financial exploitation can be devastating to customers, particularly older customers who rely on their savings and investments to pay their living expenses and who may not have the ability to offset a significant loss over time. Furthermore, the rule's safeguards are designed to ensure that there is not a misapplication of the rule.

To provide member firms with additional time to resolve matters and for APS agencies, state regulators and law enforcement to conduct thorough investigations, FINRA is proposing amending Rule 2165 to permit extending a temporary hold on a disbursement of funds or securities or a transaction in securities for an additional 30-business days if the member firm has reported the matter to a state regulator or agency or a court of competent jurisdiction.³¹

In addition, Rule 2165(d) requires members to retain records related to compliance with the rule, which shall be readily available to FINRA, upon request. To evidence compliance with Rule 2165 in placing or extending a temporary hold, FINRA is proposing to require that a member firm retain records of the reason and support for any extension of a temporary hold, including information regarding any communications with or by a state regulator or agency of competent jurisdiction or a court of competent jurisdiction.³²

³¹ The 30-business day hold period in proposed Rule 2165(b)(4) would be in addition to the 15-business day hold in Rule 2165(b)(2) and the 10-business day hold in Rule 2165(b)(3).

³² See proposed Rule 2165(d)(6).

Transactions in Securities

While placing a hold pursuant to Rule 2165 stops funds or securities from leaving a customer's account, the rule currently does not apply to transactions in securities.³³ Retrospective Review Stakeholders and commenters to the Notice 20-34 Proposal generally supported extending Rule 2165 to permit a member firm to place a temporary hold on a transaction in securities when the firm has a reasonable belief that the customer is being financially exploited.³⁴ Even if a temporary hold is placed on a disbursement out of the customer's account, these Retrospective Review Stakeholders and commenters to the Notice 20-34 Proposal noted that executing a related transaction may result in significant financial consequences for the customer (e.g., adverse tax consequences, surrender charges, the inability to regain access to a sold investment that has been closed to new investors or trading by a perpetrator in inappropriate high risk or illiquid securities).

Currently, there are 34 states with laws that allow investment advisers or broker-dealers to place some form of hold. Several Retrospective Review Stakeholders noted that while the NASAA Model Act does not extend to transactions, 20 of those 34 states (with approximately half of the U.S. population) have enacted laws permitting investment advisers and broker-dealers to place temporary holds on disbursements and transactions.³⁵

³³ For example, Rule 2165 currently would not apply to a customer's order to sell his shares of a stock. However, if a customer requested that the proceeds of a sale of shares of a stock be disbursed out of his account at the member firm, then the rule could apply to the disbursement of the proceeds where the customer is a "specified adult" and there is reasonable belief of financial exploitation.

³⁴ See, e.g., comments to the Notice 20-34 Proposal from CAI, Cambridge, Commonwealth, Edward Jones, Fidelity, FSI, IRI, LPL, Miami Investor Rights Clinic, MMLIS, NAPSA, Norcross, Philadelphia Financial Exploitation Task Force, SIFMA and Wells Fargo.

³⁵ As of June 2021, the following states permit holds on disbursement and transactions: Arkansas, Arizona, California, Florida, Iowa, Kentucky, Minnesota, Mississippi,

While some state laws permit placing holds on transactions, FINRA is proposing to amend Rule 2165 to create the first uniform national standard for placing holds on securities transactions related to suspected financial exploitation. Under the safe harbor approach, a member firm would be permitted, but not required, to place a temporary hold on a transaction when there is a reasonable belief that the customer is being financially exploited.

FINRA recognizes that placing a temporary hold on a transaction is a serious step for a member firm and the affected customer. But FINRA also recognizes that placing a temporary hold on the underlying transaction may prevent significant negative financial consequences for the customer. These negative financial consequences can result even if a temporary hold is placed on any related disbursement of funds out of the customer's account. Moreover, as discussed above, the rule includes important safeguards designed to avoid misapplication of the rule.

Need for the Proposed Amendments

Retrospective Review Stakeholders and commenters to the Notice 20-34 Proposal consistently indicated the prevalence of and problems associated with financial exploitation of

Missouri, Nebraska, New Jersey, New Mexico, North Dakota, Oklahoma, South Carolina, Texas, Utah, Virginia, Washington and West Virginia.

senior investors,³⁶ including the potential for significant and longstanding harm to customers.³⁷ Moreover, Retrospective Review Stakeholders and commenters to the Notice 20-34 Proposal generally agree that member firms need tools to address suspected financial exploitation.³⁸

As discussed in greater detail in section C infra, some Retrospective Review Stakeholders and commenters to the Notice 20-34 Proposal expressed concern that a temporary hold could be harmful to customers or that Rule 2165 could be misused by member firms. Regarding the potential of customer harm, it is important to consider that Rule 2165 is available only if the member firm has a reasonable belief that the customer is being financially exploited. Moreover, the temporary hold may be placed only on the suspicious disbursement (or transaction if the proposed amendment to extend the rule to transactions is approved). Even if the member firm has placed a temporary hold on a suspicious disbursement or transaction pursuant to Rule 2165, a temporary hold may not be placed on non-suspicious disbursements or transactions (e.g., a regular mortgage payment).

³⁶ See, e.g., comments to the Notice 20-34 Proposal from PIABA. See also Consumer Financial Protection Bureau, Office of Financial Protection for Older Americans, Suspicious Activity Reports on Elder Financial Exploitation: Issues and Trends (Feb. 2019) (highlighting that SAR filings on elder financial exploitation quadrupled from 2013 to 2017). See also U.S. Securities and Exchange Commission, Office of the Investor Advocate, Elder Financial Exploitation (June 2018) (providing an overview of studies on the prevalence of senior financial exploitation).

³⁷ See, e.g., discussion in the Senior Helpline Anniversary Report regarding a member firm placing a temporary hold to prevent a senior investor from losing \$200,000 (representing approximately two-thirds of the investor's account) related to a CIA lawsuit scam.

³⁸ See, e.g., in comments to the Notice 20-34 Proposal the Miami Investor Rights Clinic stated that it "fully supports" the proposed amendments as they will provide greater protection to seniors and vulnerable adults that may be victims of financial exploitation. IRI also stated that the proposed amendments will better enable firms to prevent the financial exploitation of vulnerable Americans.

In evaluating concerns about potential misuse of Rule 2165, neither FINRA nor commenters were able to identify any reported customer complaints on Forms U4 or U5 or pursuant to Rule 4530 related to placing a temporary hold pursuant to Rule 2165. Moreover, respondents to FINRA's survey to member firms indicated that they had not reported a complaint on Form U4 or Form U5 or pursuant to Rule 4530 related to placing any temporary holds. In addition, neither FINRA nor the states have brought any disciplinary action due to misuse of Rule 2165 or any state temporary hold law.³⁹

The demonstrated and potential benefits of Rule 2165 weigh in favor of the proposed rule change. Notably, Rule 2165 has been used by member firms to address suspected financial exploitation and these temporary holds have prevented significant financial harm to customers.⁴⁰ Moreover, Retrospective Review Stakeholders and commenters to the Notice 20-34 Proposal stressed that, even if a temporary hold is placed on a disbursement of funds or securities, a customer can experience significant negative financial consequences if a suspicious transaction is permitted.⁴¹

Some Retrospective Review Stakeholders and commenters to the Notice 20-34 Proposal believe that the proposed extension of the hold period is too long and could be harmful to customers.⁴² Commenters to the Notice 20-34 Proposal stated that some matters can be quickly

³⁹ This lack of disciplinary action by FINRA and the states is also noted in the NASAA's comment letter to the Notice 20-34 Proposal.

⁴⁰ See, e.g., Protecting Senior Investors 2015–2020: An Update on the FINRA Securities Helpline for Seniors, Other FINRA Initiatives and Member Firm Practices (Apr. 2020).

⁴¹ See, e.g., comments to the Notice 20-34 Proposal from Edward Jones and the Miami Investor Rights Clinic.

⁴² See, e.g., comments to the Notice 20-34 Proposal from NASAA and the Pittsburgh Clinic.

resolved after placing a temporary hold, but complex matters that involve investigations by state regulators or agencies or legal actions in a court (e.g., financial exploitation of an elderly customer by a family member or caregiver) may need additional time to resolve.⁴³ In considering the appropriate time period, it is notable that NAPSA and the Philadelphia Financial Exploitation Task Force—representing APS programs which play a critical role in investigating suspicions of financial exploitation—also expressed in their comments to the Notice 20-34 Proposal the need for additional time to conduct investigations. NAPSA’s comment letter to the Notice 20-34 Proposal also shared data in support of the need for a longer hold period in Rule 2165 that the average investigation duration of reported matters to the federal National Adult Maltreatment Reporting System (NAMRS) is 52.6 days.

In considering the proposed extension of Rule 2165 to securities transactions, it is notable that approximately 50% of the U.S. population lives in a state that permits broker-dealers and investment advisers to place holds on suspicious securities transactions pursuant to state law.

These state laws represent a patchwork where some customers may be afforded greater protection from financial exploitation than other customers. In contrast, Rule 2165 provides a uniform national standard for placing temporary holds when there is a reasonable belief of financial exploitation. Moreover, Rule 2165 incorporates numerous safeguards that apply to each temporary hold and that are designed to ensure that there is not a misapplication of the rule.

If the Commission approves the proposed rule change, FINRA will announce the implementation date of the proposed rule change in a Regulatory Notice. The implementation date will be no later than 180 days following publication of the Regulatory Notice announcing Commission approval.

⁴³ See, e.g., comments to the Notice 20-34 Proposal from Edward Jones.

2. Statutory Basis

The proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,⁴⁴ which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The proposed rule change will promote investor protection by allowing for additional time for firms to resolve matters and for APS agencies, state regulators and law enforcement to conduct thorough investigations of suspected financial exploitation. Customers would benefit from this extension in instances where the additional time allows for a positive identification of financial exploitation and retention of the disbursement amount within the account. The proposed rule change also will allow firms to place temporary holds on transactions, which should prevent harm to exploited customers such as being subject to adverse tax consequences, early withdraw penalties or investments that do not align with their investor profiles. Moreover, the rule incorporates numerous safeguards that apply to each temporary hold and that are designed to ensure that there is not a misapplication of the rule.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. All member firms would be subject to the proposed rule change.

Economic Impact Assessment

FINRA has undertaken an economic impact assessment, as set forth below, to further analyze the regulatory need for the proposed rule change, its potential economic impacts,

⁴⁴ 15 U.S.C. 78q-3(b)(6).

including anticipated costs, benefits, and distributional and competitive effects, relative to the current baseline, and the alternatives FINRA considered in assessing how best to meet its regulatory objective.

Regulatory Need

FINRA is active in its efforts to protect senior investors from financial exploitation. In the context of these efforts, and with evidence of a growing trend of such exploitation⁴⁵, FINRA conducted a review of relevant existing rules and administrative processes that help protect senior investors from financial exploitation. Through this review, FINRA has received feedback on the effectiveness and efficiency of Rule 2165.

Economic Baseline

The economic baseline for the proposed rule amendments is the current Rule 2165 and its use by member firms, as well as existing firm policies and state laws related to protecting senior investors. As discussed above, in August 2019, FINRA launched a retrospective review to assess the effectiveness and efficiency of its rules and administrative processes that help protect senior investors from financial exploitation. To conduct the assessment phase of the retrospective rule review, FINRA first sought comment in Regulatory Notice 19-27. FINRA obtained input from several advisory committees comprising member firms of different sizes and business models, investor protection advocates, and member firms, and from trade associations. In addition, FINRA obtained the perspective of its operating departments that touch the rules and their administration.

FINRA also distributed a survey to all member firms in the first quarter of 2020, to which a subset of firms, ranging from small to large firms, responded. The purpose of the survey was

⁴⁵ See supra note 36.

to collect information and to provide member firms an additional opportunity to provide their views. The economic baseline, regarding the current application of the rule by firms and the effectiveness and efficiency of the rule, is established using the information obtained during the assessment phase.

As noted above, with respect to the use of Rule 2165 in placing a temporary hold on disbursements, of the member firms that indicated having placed a temporary hold,⁴⁶ approximately 53% of survey respondents stated that the firm had been unable to resolve the matter within the 25-business day period provided by the rule. For firms responding that any matter took longer to resolve than the 25-business day period, approximately 35% indicated that it took on average 26-50 days to resolve the matter and approximately 59% indicated that it took on average 51-100 days to resolve the matter.

With respect to the issue of placing a temporary hold on transactions, currently 20 states (with approximately half of the U.S. population) have enacted laws permitting investment advisers and broker-dealers to place temporary holds on disbursements and transactions.

Economic Impacts

FINRA has analyzed the potential costs and benefits of the proposed amendments, and the different parties that are expected to be affected. FINRA has identified senior investors and member firms that serve senior investors as the main parties to be impacted by the proposed amendments.

⁴⁶ Thirty-one firms responded in the survey that they had placed a temporary hold. Out of the 31 firms that indicated that they had placed a temporary hold, 17 firms indicated that it took more than the 25-business day period to resolve the matter, as currently provided in Rule 2165.

The proposed amendments to Rule 2165 would permit extending a temporary hold for an additional 30-business days if the member firm has reported the matter to a state agency or a court of competent jurisdiction. FINRA believes that allowing an extension to the temporary hold period would provide firms additional time to resolve matters and for APS agencies, state regulators and law enforcement to conduct thorough investigations of suspected financial exploitation. Moreover, extensions may allow for greater collaboration and interaction between the member firm placing the hold and other authorities or regulators, on a local, state or national level. Customers would benefit from this extension in instances where the additional time allows for a positive identification of financial exploitation and retention of the disbursement amount within the account. Alternatively, if the additional time leads to a determination that no financial exploitation occurred, customers may incur costs from the extended delay in access to the funds.

The proposed amendments would also extend Rule 2165 to permit a member firm to place a temporary hold on a transaction in securities when the firm has a reasonable belief that the customer is being financially exploited. Twenty states, together containing approximately half of the U.S. population, already permit firms to place temporary holds on transactions. The proposed amendments would impact firms in all states by providing a safe harbor under FINRA rules for firms to place holds on transactions. The extent of the impact would vary across firms depending on their decision to take advantage of the proposed extension of Rule 2165 to transactions.⁴⁷ The proposed amendments would also impact the customers of those firms. In instances when a firm's hold on a transaction prevented financial exploitation, the customer

⁴⁷ When asked in the survey about FINRA extending Rule 2165 to transactions, respondents were evenly split with 50% anticipating that the member firm would place holds on transactions pursuant to amended Rule 2165 and 50% anticipating that the firm would not place holds.

whose transaction was held would benefit from not incurring the negative financial consequences of the transaction. In instances when a transaction hold was executed and no financial exploitation was found, the economic impact of the hold stems primarily from the magnitude of the security's price movement (positive or negative) between the time the hold was placed and the time it was lifted.

Alternatives Considered

FINRA considered various alternatives to the proposed rule amendments. First, FINRA considered different possible extensions of the temporary hold period, ranging from no extension to an extension of up to 75-business days. On the one hand, a longer temporary hold period would allow member firms more time to investigate and contact the relevant parties, as well as obtain input from a state regulator, agency, or court if needed. Alternatively, an extended temporary hold period could result in increased costs to both investors and firms.⁴⁸ These include increased costs to investors from lost investment opportunities or liquidity problems and increased costs to firms from legal challenges to investigations, all of which are anticipated to be related to the length of the hold on disbursements. Considering these factors, as well as information from the various outreach efforts and stakeholder engagements, FINRA believes that the proposal strikes a balance across the spectrum of possible options.

Second, FINRA considered not extending Rule 2165 to transactions, but rather keeping the temporary hold option only for disbursements. FINRA weighed the costs and benefits of doing so, as discussed above, also considering that some states already permit such a hold on transactions. Ultimately, FINRA has found the proposed amendment to expand Rule 2165 to

⁴⁸ See discussion in “Economic Impacts” section above in section B, “Hold Period” section below in section C, and Regulatory Notice 20-34.

transactions to strike an appropriate balance between regulatory burden, investor protection and investor choice.

Third, FINRA considered requiring firms to place temporary holds, for either disbursements or transactions, rather than permitting it. FINRA believes that providing firms with the discretion of placing a hold, versus a requirement, results in incentives to use the hold option in a way that ultimately benefits both the firm and its' customers.⁴⁹

Finally, FINRA considered extending Rule 2165 to situations where a firm has a reasonable belief that one of its customers is exhibiting signs of diminished capacity or cognitive decline, affecting the customers' ability to protect their own financial interests, without any evidence of financial exploitation. FINRA believes that the associated costs with establishing such a standard outweigh the potential benefits. Such an extension would give discretion to member firms that could directly or indirectly impede informed investor choice, with potential costs that might exceed the potential benefits from investor protection.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The proposed rule change was published for comment in Regulatory Notice 20-34. FINRA received 19 comment letters in response to the Notice 20-34 Proposal. A copy of the Notice 20-34 Proposal is attached [sic] as Exhibit 2a. Copies of the comment letters received in response to the Notice 20-34 Proposal are attached [sic] as Exhibit 2c.⁵⁰

The comments and FINRA's responses are set forth in detail below.

⁴⁹ See Bruce I. Carlin, Tarik Umar, and Hanyi Yi, Deputization, National Bureau of Economic Research Working Paper No. 27225 (May 2020) (discussing the benefits of providing financial institutions tools to address suspected financial exploitation versus requiring specific actions).

⁵⁰ See Exhibit 2b for a list of abbreviations assigned to commenters.

Support for the Notice 20-34 Proposal

Fourteen commenters expressed support for the Notice 20-34 Proposal.⁵¹ Several commenters stated that the proposed amendments will better protect vulnerable investors from financial exploitation. For example, Miami Investor Rights Clinic stated that it “fully supports” the proposed amendments as they will provide greater protection to seniors and vulnerable adults that may be victims of financial exploitation. IRI also stated that the proposed amendments will better enable firms to prevent the financial exploitation of vulnerable Americans.

LPL supported the proposed amendments but requested that the hold period be further extended to allow for holds of up to 100-business days. Regarding the hold period in Rule 2165, FINRA has tried to strike a reasonable balance in giving member firms adequate time to investigate and contact the relevant parties, as well as seek input from a state regulator or agency or a court if needed, but also not permitting an open-ended hold period in recognition of the seriousness of placing a temporary hold. Rule 2165 would continue to permit the temporary hold to be terminated or extended by a state regulator, state agency or court of competent jurisdiction. In addition, if the proposed hold period does not provide member firms adequate time to investigate and contact the relevant parties, as well as seek input from a state regulator or agency or a court if needed, FINRA may consider extending the temporary hold period in future rulemaking.

Opposition to or Concerns with the Notice 20-34 Proposal

PIABA supports enhanced protections for investors but expressed concern that member firms could misuse the proposed amendments. PIABA recommended that FINRA require in

⁵¹ See CAI, Cambridge, Commonwealth, Edward Jones, Fidelity, FSI, IRI, Miami Investor Rights Clinic, MMLIS, NAPSA, Norcross, Philadelphia Financial Exploitation Task Force, SIFMA and Wells Fargo.

Rule 2165 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 APS agency and state regulator as soon as reasonably practical but no later than seven business days from the initial hold period.

Regarding PIABA's suggested requirements, Rule 2165 currently includes several safeguards designed to prevent misapplication of the rule, including requiring that member firms that intend to place a hold pursuant to Rule 2165 must: (1) retain records related to the firm's internal investigation;⁵² and (2) develop and document training policies or programs reasonably designed to ensure that associated persons comply with the requirements of the rule.⁵³ FINRA also expects member firms to comply with all applicable state requirements, including reporting requirements.

NASAA's letter acknowledges that neither FINRA nor the states have brought disciplinary action due to misuse of Rule 2165 or any state temporary hold laws by a member firm. However, as discussed in greater detail below, NASAA does not support extending the temporary hold period and expressed concern about the potential impact of a longer hold period on customers. FINRA's responses to NASAA's detailed concerns are included below in section C under "Hold Period" and "Transactions in Securities."

Pittsburgh Clinic does not support current Rule 2165 or the proposed amendments because it believes that member firms could misuse temporary holds for their financial benefit.

⁵² See Rule 2165(d).

⁵³ See Supplementary Material .02 to Rule 2165.

FINRA has extensively addressed the concerns of potential misuse above in section A under the “Need for the Proposed Amendments.”

Pittsburgh Clinic also said that the survey of member firms should not be relied on to assess Rule 2165 or the proposed amendments because: (1) the survey respondents are member firms that stand to benefit from an increase to the extension of the hold period, as well as the rule’s safe harbor provisions; (2) the survey respondents were not required to provide any information to support their claims; and (3) the survey respondents represent an inadequate and unrepresentative sample size (the survey was provided to 3,516 member firms, of which only 238 member firms responded).

FINRA engaged in extensive internal and external stakeholder outreach during the assessment phase of the retrospective review to assess the effectiveness and efficiency of FINRA’s rules and administrative processes that help protect senior investors from financial exploitation. This outreach included: (1) seeking comment in Regulatory Notice 19-27 on several questions with respect to addressing financial exploitation and other circumstances of financial vulnerability for senior investors; (2) obtaining input from several advisory committees comprising member firms of different sizes and business models, investor protection advocates, member firms, and trade associations; (3) obtaining the perspective of FINRA’s operating departments that administer the rules and their administration; (4) considering FINRA examination observations and findings involving senior issues; and (5) developing an anonymous survey that was distributed to all member firms in the first quarter of 2020. In addition, as part of the action phase of the retrospective review, FINRA sought comment on the proposed amendments to Rule 2165 in Regulatory Notice 20-34. FINRA considered the

collective feedback from the Retrospective Review Stakeholders and comments to the Notice 20-34 Proposal in assessing Rule 2165 and the proposed amendments.

The purpose of the survey distributed to all member firms was to collect information in order to validate the feedback received and to provide an additional opportunity for all member firms to provide their views. There were 238 firms that responded to the survey, and the breakdown of these firm survey respondents according to firm size, as measured by the number of registered representatives, and the comparison to the general population of member firms, is provided in Table 1 below. With respect to the Pittsburgh Clinic comment letter, FINRA notes that: (1) the membership survey is one tool frequently used by FINRA in its outreach efforts to solicit information from its members; (2) the response rate mentioned is a lower bound when considering relevant member firms; and (3) the breakdown of survey respondents by firm size is mostly representative with respect to the full member firm population, as summarized in Table 1.

Firm Size	# RRs	Industry		Survey Respondents	
		Count	% Total	Count	% Total
Small	1 - 150	3,153	90%	141	59%
Medium	151 - 499	198	5%	12	5%
Large	500+	168	5%	24	10%
Unknown	N/A	N/A	N/A	61	26%
Total		3,519	100%	238	100%

Hold Period

The majority of commenters supported the proposed amendment to extend a temporary hold for an additional 30 business days if the member firm has reported the matter to a state regulator or agency or a court of competent jurisdiction.⁵⁴ For example, Edward Jones stated

⁵⁴ See CAI, Cambridge, Commonwealth, Edward Jones, Fidelity, FSI, IRI, Miami Investor Rights Clinic, MMLIS, NAPSA, Norcross, Philadelphia Financial Exploitation Task Force, SIFMA and Wells Fargo.

that the firm is often able to quickly resolve matters where it suspects financial exploitation of a senior or vulnerable investor by engaging the customer's trusted contact person or using other tools, but the firm has experienced situations where the current 25-day period provided under Rule 2165 is insufficient. Edward Jones notes having experienced this situation when working with state agencies, such as APS, to investigate a case of suspected financial exploitation. Edward Jones stated that some APS agencies are not adequately resourced to quickly review these matters and yet are hesitant to request an extension of a hold until they determine whether exploitation exists.

While NAPSA and Philadelphia Financial Exploitation Task Force previously supported a 60-business day extension in their comments to Regulatory Notice 19-27, they supported the proposed extension of the temporary hold period in the Notice 20-34 Proposal. NAPSA and Philadelphia Financial Exploitation Task Force noted that the latest data submitted to the NAMRS indicates that the average investigation duration of all reported cases is 52.6 days. Recognizing that financial exploitation investigations are often more complicated and time consuming, NAPSA and Philadelphia Financial Exploitation Task Force expressed appreciation for the additional days as a starting point, with the ability to revisit as more data becomes available.

While acknowledging that an adequate period for review of the facts and circumstances must be allowed, Pittsburgh Clinic stated that the proposed longer hold period increases the possibility that a member firm could misuse a hold to harm an investor. Pittsburgh Clinic stated that the proposed hold period is too long because customers may need the funds to pay for living expenses. Pittsburgh Clinic also expressed concern that Rule 2165 does not include a reporting

requirement unless a member firm wants to avail itself of the additional 30-business day extension.

NASAA believes that the current 25-business day hold period, with the authority for state regulators or agencies or the courts to terminate or extend, is the better approach as it provides time to conduct the investigation and avoids unintended hardships from lengthy delays. Moreover, NASAA supports involving state regulators or agencies or the courts within the initial 15-business day hold period specified in Rule 2165(b)(2).

Information gathered during the assessment phase of the retrospective review, including discussions during exams in 2019 focusing on Rule 2165 and a survey to FINRA membership, supports the need for additional time to conduct investigations and resolve matters. NAPSA—representing APS programs which play a critical role in investigating suspicions of financial exploitation—also expressed the need for additional time to conduct investigations. NAPSA’s data that the average investigation duration of reported matters to the NAMRS is 52.6 days also highlights the need for a longer period to conduct investigations and resolve matters.

Retrospective Review Stakeholders and comments to the Notice 20-34 Proposal indicated that some matters can be quickly resolved after placing a temporary hold (e.g., by explaining to the customer that the activity and requested disbursement fits a commonly known scam). However, complex matters that involve investigations by state regulators or agencies or legal actions in a court (e.g., financial exploitation of an elderly customer by a family member or caregiver) may need additional time to resolve. These complex matters often involve information gathering and sharing by the firm and the state agency or regulatory investigating the matter.

To provide member firms with additional time to resolve matters and for APS agencies, state regulators and law enforcement to conduct thorough investigations, FINRA is proposing amending Rule 2165 to permit extending a temporary hold for an additional 30 business days if the member firm has reported the matter to a state agency or a court of competent jurisdiction. Extending the hold period as proposed is intended to address the complex matters that need additional time to resolve. In addition, some states mandate reporting of suspected financial exploitation by financial institutions, including broker-dealers, within a specified period of time. FINRA expects member firms to comply with all applicable state requirements, including reporting requirements.

In addition, FINRA agrees with the commenters who stressed the need for a temporary hold not to interfere with non-suspicious disbursements that are needed for the customer's expenses. A temporary hold pursuant to Rule 2165 may be placed only on the suspicious disbursement (or transaction if the proposed amendment to extend the rule to transactions is adopted). A temporary hold may not be placed on non-suspicious disbursements or transactions (e.g., a regular mortgage payment).

Commonwealth supported the proposed extension of the temporary hold period and stated that there should be some additional remedy when a matter is not resolved at the end of the hold period. As previously addressed in the rule filing to adopt Rule 2165, if a member firm is unable to resolve an issue due to circumstances beyond its control, there may be circumstances in which a member firm may extend a temporary hold after the period provided under the safe harbor.⁵⁵

⁵⁵ See File No. SR-FINRA-2016-039.

NAPSA and the Philadelphia Financial Exploitation Task Force requested clarification on whether “a state regulator or agency of competent jurisdiction” would include state or local law enforcement. For purposes of Rule 2165, FINRA would interpret state or local law enforcement to be “a state regulator or agency of competent jurisdiction” and, accordingly, state or local law enforcement may terminate or extend a temporary hold pursuant to Rule 2165.

SIFMA noted that, depending on the jurisdiction, APS may be a state or local agency and suggested revising proposed Rule 2165(b)(4) to refer to a “state regulator, or an agency of competent jurisdiction” to more clearly cover local APS. The inclusion of “a state regulator or agency of competent jurisdiction” in proposed Rule 2165(b)(4) is consistent with the language in current Rule 2165(b)(2) and (3). For purposes of Rule 2165, FINRA would interpret state or local APS to be “a state regulator or agency of competent jurisdiction” and, accordingly, state or local APS may terminate or extend a temporary hold pursuant to Rule 2165.

Transactions in Securities

The majority of commenters supported the proposed amendment to permit member firms to place a temporary hold on a securities transactions where there is a reasonable belief of financial exploitation.⁵⁶ For example, NAPSA and the Philadelphia Financial Exploitation Task Force applauded the creation of a uniform national standard for placing holds on transactions related to suspected financial exploitation. Miami Investor Rights Clinic stated that substantial damage can result from securities transactions due to financial exploitation and that appropriate policies, procedures, and training can minimize any misapplication Rule 2165. Edward Jones stated that the financial harm resulting from exploitative transactions can take many forms,

⁵⁶ See CAI, Cambridge, Commonwealth, Edward Jones, Fidelity, FSI, IRI, LPL, Miami Investor Rights Clinic, MMLIS, NAPSA, Norcross, Philadelphia Financial Exploitation Task Force, SIFMA and Wells Fargo.

including selling long-held investments with low cost basis resulting in a significant tax liability, the sale of fixed income investments with yields more attractive than current rates, and the sale of variable annuities, which could lead to surrender charges. Edward Jones stated that the perpetrator of the exploitation could also utilize the proceeds of these sales to invest in high-risk securities further jeopardizing the financial security of the senior or vulnerable investor. Edward Jones stated that when balanced against the potential financial devastation to the senior or vulnerable investor, the proposal is a natural extension of the current rule that will further minimize the risk of financial harm and provide greater protection for senior and vulnerable investors.

In its comment to Regulatory Notice 19-27, PIABA cautioned FINRA against substantive changes to Rule 2165 that might conflict with state laws. However, PIABA noted that the recently adopted state laws allow for holds on securities transactions and disbursements. Pittsburgh Clinic expressed concern that the proposed extension gives too much authority to member firms with limited oversight and that the customer may bear the risk of loss if firm makes the wrong call in placing a hold.

NASAA stated that if FINRA extends Rule 2165 to permit placing holds on securities transactions, the supervision and documentation requirements under Rule 2165(c)-(d), and the training specified in Supplementary Material .02 to Rule 2165, should be enhanced to require a documented rationale stating why the customer's financial professional and the member firm believe that a transaction hold will protect the customer whereas a disbursement hold would not. NASAA stated that documentation should be reviewed as a part of FINRA examinations. NASAA believes that disbursement holds should be the default and that a transaction hold should be utilized only where a disbursement hold cannot adequately protect a customer.

Furthermore, NASAA supports member firms establishing policies and procedures to address any harm that may result to the customer from a transaction hold.

FINRA recognizes that placing a temporary hold on a transaction is a serious step for a member and the affected customer. Requiring that a member firm make a disbursement hold the default and use transaction holds only where a disbursement hold cannot adequately protect the customer would add complexity and uncertainty into the decision to place a temporary hold as the member firm would be required to weigh the consequences to the customer of placing the hold at different stages. Moreover, placing a temporary hold on the underlying transaction may prevent significant negative financial consequences for the customer. These negative financial consequences can result even if a temporary hold is placed on any related disbursement of funds out of the customer's account.

Importantly, the ability to place a hold on a transaction pursuant to Rule 2165 would apply only if the firm had a reasonable belief that the customer was being financially exploited. As noted above, FINRA would pursue disciplinary action against a firm that uses Rule 2165 for inappropriate purposes. As discussed in Regulatory Notice 20-34 and NASAA's comment letter to Regulatory Notice 20-34, neither FINRA nor the states have brought an action against a member firm for misuse of a temporary hold to address suspected financial exploitation.

Some member firms already place holds on securities transactions pursuant to state law. As noted in section A of this filing, currently, 20 states (with approximately half of the U.S. population) have enacted laws permitting investment advisers and broker-dealers to place temporary holds on disbursements and transactions. Amending Rule 2165 as proposed would create the first uniform national standard for placing holds on transactions related to suspected

financial exploitation. Moreover, extending Rule 2165 to transactions would allow for consistent, national safeguards to avoid misapplication of temporary holds.

NASAA also noted that the NASAA Model Act is limited to disbursements, in part, because a delay in a securities transaction could be deemed inconsistent with best execution requirements. Regarding whether the best execution obligation applies to a member firm's decision to place a temporary hold on a securities transaction where there is a reasonable belief of customer financial exploitation, "[b]roker-dealers are reminded that nothing under the federal securities laws or FINRA rules obligates them to accept an order where they believe that the associated compliance or legal risks are unacceptable."⁵⁷

Mandatory Holds

Miami Investor Rights Clinic noted that Rule 2165 is a safe harbor and that FINRA should consider amendments to Rule 2165 requiring that member firms place temporary holds. FINRA believes that a member firm using its discretion to place a temporary hold allows for the judicious use of temporary holds to protect customers from financial exploitation.

Cognitive Decline or Diminished Capacity

Some commenters supported extending Rule 2165 to situations where a firm has a reasonable belief that the customer has an impairment, such as diminished capacity, that renders the individual unable to protect his or her own interests, even though there is no evidence of

⁵⁷ See SEC Staff Bulletin: Risks Associated with Omnibus Accounts Transacting in Low-Priced Securities (Nov. 12, 2020), available at <https://www.sec.gov/tm/risks-omnibus-accounts-transacting-low-priced-securities> (SEC Staff Bulletin). The SEC Staff Bulletin provides that, where the broker-dealer determines that the risks cannot be appropriately managed, and particularly in the context of low-priced securities transactions, a broker-dealer should consider, among other things, restricting or rejecting transactions effected on behalf of the customers of a foreign financial institution.

financial exploitation.⁵⁸ Some Retrospective Review Stakeholders also supported extending Rule 2165 to these situations. However, other Retrospective Review Stakeholders expressed concerns that member firms are not well-positioned to determine if a customer is suffering from cognitive decline or diminished capacity in the absence of suspected financial exploitation. In addition, in comments to Regulatory Notice 19-27, the Cornell Clinic, NASAA, PIABA and Pittsburgh Clinic expressed concerns that such an extension would give member firms too much discretion or would unfairly impede customer autonomy.

FINRA has not proposed to extend Rule 2165 to situations where a member firm has a reasonable belief that the customer has cognitive decline or diminished capacity but there is no evidence of financial exploitation due to the concerns expressed that such an extension would give member firms too much discretion or would unfairly impede customer autonomy. Rather than rulemaking, FINRA summarized the information obtained about member firms' procedures and practices in this area in Regulatory Notice 20-34 to assist other member firms and investors.

Trusted Contact Person

Where a customer has not named a trusted contact person, Wells Fargo suggested that FINRA give member firms the flexibility to contact a person "reasonably associated" with the customer's account.

Under Rule 2165 as originally proposed in Regulatory Notice 15-37 (October 2015) (Notice 15-37 Proposal), if the trusted contact person was unavailable, a member firm placing a hold would have been required to contact an immediate family member, unless the member reasonably believed that the immediate family member was financially exploiting the customer.

⁵⁸ See Miami Investor Rights Clinic, NAPSA, Philadelphia Financial Exploitation Task Force and Wells Fargo.

Commenters to the Notice 15-37 Proposal expressed concerns that the proposed requirement would impinge upon customer privacy and would be operationally challenging for member firms in identifying the customer's immediate family members. Due to these concerns, FINRA removed the requirements in the Notice 15-37 Proposal with respect to notifying an immediate family member when a temporary hold is placed. In the rule filing to adopt Rule 2165, FINRA noted that Rule 2165 would not preclude a member firm from contacting an immediate family member or any other person if the member has customer consent to do so and that contacting such persons may be useful to member firms in administering customer accounts.⁵⁹

NAPSA and the Philadelphia Financial Exploitation Task Force recommended that FINRA pursue efforts to promote use of trusted contact persons by customers. FINRA has taken steps to encourage customers to name trusted contact persons. For example, the SEC's Office of Investor Education and Advocacy and FINRA collaborated on an Investor Bulletin that helps customers understand the purpose of designating a trusted contact person for brokerage accounts, and encourages customers to designate a trusted contact person.⁶⁰ In addition, in April 2018, FINRA published a similar article providing information on the trusted contact person-related amendments to Rule 4512 and Rule 2165 for investors and member firms.⁶¹ FINRA and the FINRA Investor Education Foundation have highlighted these articles on FINRA-managed

⁵⁹ See File No. SR-FINRA-2016-039.

⁶⁰ The Investor Bulletin was published in March 2020 and is available on the SEC's website at <https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins-trusted-contact> and on FINRA's website at <https://www.finra.org/investors/insights/consider-adding-trusted-contact-to-your-account>.

⁶¹ FINRA made a downloadable print version of the article available at https://www.finra.org/sites/default/files/Protecting-Seniors-From-Financial-Exploitation_0.pdf.

social media channels, including Facebook and Twitter, and staff regularly discuss the benefits of designating a trusted contact when speaking with individual investors.

Reporting Requirements

Several commenters expressed concern that Rule 2165's safe harbor does not extend to complaints reportable on Forms U4 (Uniform Application for Securities Industry Registration or Transfer) or U5 (Uniform Termination Notice for Securities Industry Registration), or pursuant to Rule 4530 about an associated person whose actions were within the safe harbor and stated that some member firms and associated persons may choose not to place a hold pursuant to Rule 2165 because of concerns about a possible customer complaint.⁶² These commenters requested guidance on when a Rule 2165-related complaint would be reportable and supported developing a specific problem code for reporting any Rule 2165-related complaint to FINRA pursuant to FINRA Rule 4530. FSI suggested that FINRA consider additional protections for financial professionals so they can confidently act when there is possible exploitation that could have long-term negative consequences on a client's financial future and overall well-being.

As discussed in Regulatory Notice 20-34, to date, based on FINRA's review of reported complaints, member firms have not reported a complaint on Forms U4 or U5 or pursuant to Rule 4530 related to placing a temporary hold pursuant to Rule 2165. Moreover, survey respondents indicated that they had not reported a complaint on Form U4 or Form U5 or pursuant to Rule 4530 related to placing any temporary holds.

FINRA does not currently plan to propose guidance regarding when a Rule 2165-related complaint would be reportable or develop a specific problem code for reporting any Rule 2165-related complaint to FINRA pursuant to FINRA Rule 4530. In considering whether a complaint

⁶² See Cambridge, FSI and SIFMA.

is reportable, member firms should use the existing publicly available guidance. FINRA may reconsider this issue or develop a specified problem code for reporting any Rule 2165-related complaint to FINRA pursuant to FINRA Rule 4530 if complaints are reported in the future and they appear to have a detrimental impact on the protection of seniors and other vulnerable adults.

Customer Actions

Cambridge supported extending the safe harbor provided by Rule 2165 to protecting member firms and registered representatives from customer actions as a result of steps taken by a member firm pursuant to Rule 2165. FINRA previously addressed this issue when adopting Rule 2165, noting that member firms today make judgments with regard to making or withholding disbursements and already face litigation risks with respect to these decisions.⁶³ Rule 2165 is designed to provide regulatory relief to member firms by providing a safe harbor from FINRA rules for a determination to place a hold. Some states may separately provide immunity to member firms under state law.

Scope of Rule 2165

Because some state temporary hold laws cover customers younger than 65 years of age, LPL suggested that FINRA amend the definition of “specified adult” in Rule 2165(a)(1) to include persons 60 years of age and older. In adopting Rule 2165, FINRA solicited feedback regarding whether the ages used in the definition of “specified adult” in proposed Rule 2165 should be modified or eliminated. As discussed in the rule filing proposing Rule 2165, some commenters suggested including an age lower than 65 and some commenters suggested including an age over 65 in the definition.⁶⁴ The inclusion of persons 65 and older in the

⁶³ See File No. SR-FINRA-2016-039.

⁶⁴ See File No. SR-FINRA-2016-039.

definition reflects, in part, that federal agencies, FINRA and NASAA have focused on persons age 65 and older for various senior initiatives. In addition, the definition of “specified adult” in Rule 2165(a)(1) also includes persons 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.

Manabat stated that FINRA rules protecting senior investors should apply to non-U.S. investors. For clarity, FINRA rules apply to U.S. and non-U.S. customers of member firms.

NAPSA and the Philadelphia Financial Exploitation Task Force recommended that investment companies, such as mutual funds, be permitted to place temporary holds. In 2018, staff in the SEC’s Division of Investment Management issued a no-action letter to the Investment Company Institute stating that the staff would not recommend enforcement action if, consistent with the conditions in the letter, a transfer agent, acting on behalf of a mutual fund, temporarily delayed for more than seven days the disbursement of redemption proceeds from the mutual fund account of a specified adult held directly with the transfer agent based on a reasonable belief that financial exploitation of the specified adult has occurred, is occurring, has been attempted, or will be attempted.⁶⁵ The no-action letter permits mutual fund transfer agents to protect specified adult shareholders from financial exploitation to the same extent that broker-dealers may do so currently under FINRA Rule 2165.

If a member firm places a temporary hold, Rule 2165 requires the member to immediately initiate an internal review of the facts and circumstances that caused the member to reasonably believe that financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted. FSI recommended that FINRA provide additional

⁶⁵ See Investment Company Institute, SEC No-Action Letter (June 1, 2018).

guidance to member firms on conducting these internal reviews. FSI stated that state regulators and agencies have the appropriate expertise to conduct these types of investigations and member firms work cooperatively to provide state regulators and agencies with requested information. FSI stated that member firms have access to internal records that evidence the customer's regular trading and account disbursement activity, but firms do not want to, for example, front-run and jeopardize a criminal investigation by trying to contact and interview witnesses.

As stated in the rule filing proposing the adoption of Rule 2165, FINRA believes that the appropriate internal review will depend on the facts and circumstances of the situation.⁶⁶ Member firms have discretion in conducting a reasonable internal review under proposed Rule 2165. In addition, Rule 2165 gives member firms flexibility regarding notifying some parties when the member firm reasonably suspects that the party is involved in the financial exploitation. Specifically, Rule 2165(b)(1)(B)(i)-(ii) provides that a member firm is not required to provide notification of a temporary hold to a party authorized to transact business on the account or the trusted contact person if the member firm reasonably suspects that the authorized party or trusted contact person, respectively, may be engaged in the financial exploitation of the specified adult.

If Rule 2165 is extended to allow for temporary holds on transactions in securities, FSI suggested that FINRA expand the application of the safe harbor provided by Rule 2165 to cover both FINRA Rule 3260 (Discretionary Accounts) and FINRA Rule 5310.01 (Execution of Marketable Customer Orders).

Rule 3260's scope and purpose are distinguishable from permitting a member firm to place a temporary hold on a transaction when there is a reasonable belief that the customer is

⁶⁶ See File No. SR-FINRA-2016-039.

being financially exploited. Rule 3260 addresses the creation and maintenance of discretionary accounts and requires firms to have procedures to identify and prevent excessive trading or “churning” in such accounts. Rule 3260 is intended to protect customers from the misuse of discretionary power by firms and associated persons.

In considering whether Rule 2165’s safe harbor needs to be extended to address rules relating to order execution, “[b]roker-dealers are reminded that nothing under the federal securities laws or FINRA rules obligates them to accept an order where they believe that the associated compliance or legal risks are unacceptable.”⁶⁷

Outreach and Collaboration

CAI requested that FINRA coordinate with state authorities and SEC on measures to address financial exploitation. FINRA has and will continue to prioritize senior investors and address financial exploitation of senior investors, including through:

- Carrying out a multi-faceted investor protection campaign through the FINRA Foundation aimed at promoting awareness about, and support for, the prevention of financial fraud and exploitation, while simultaneously empowering financial consumers to protect themselves and their loved ones, using tactics including:
 - Training law enforcement and victim advocates to detect, investigate, and assist consumers with concerns of financial fraud and exploitation in collaboration with federal and state securities regulators, APS groups, NAPSA, the National Center for Victims of Crime, the National White Collar Crime Center, and staff from FINRA’s National Cause and Financial Crimes Detection Programs;

⁶⁷ See SEC Staff Bulletin.

- Engaging in consumer outreach—often in coordination with the SEC, CFPB, state securities regulators, and nonprofits such as AARP and Better Business Bureaus—to empower financial consumers to spot, avoid, and report financial fraud;
- Conducting, supporting, and disseminating research focused on financial exploitation and fraud as well as aging and financial decision-making, which is shared with internal and external stakeholders;⁶⁸
- Collaborating with Committees and Task Forces focused on issues of financial fraud and exploitation, including working with the Department of Justice’s Elder Justice Initiative, serving on NAPSA’s Financial Exploitation Advisory Board, serving on NASAA’s Senior Issues and Diminished Capacity Committee Advisory Council, participating on various multi-disciplinary teams (MDTs) aimed at protecting and assisting vulnerable adults, and holding joint trainings with the CFPB’s Office of Older Americans, and meeting periodically with state securities regulators and states’ attorneys general to discuss senior investor protection issues;⁶⁹
- Issuing alerts and articles that educate investors about important issues and highlighting risks facing senior investors;⁷⁰

⁶⁸ See FINRA Investor Education Foundation Investor Protection Campaign Research, available at www.finrafoundation.org/fraudresearch.

⁶⁹ See Protecting Senior Investors 2015–2020: An Update on the FINRA Securities Helpline for Seniors, Other FINRA Initiatives and Member Firm Practices (Apr. 2020).

⁷⁰ See, e.g., articles such as Protecting Seniors from Financial Exploitation and Don’t Give in to Power of Attorney Pressure; Investor Alerts such as Power of Attorney and Your Investments–10 Tips, Plan for Transition: What You Should Know About the Transfer of

- Launching the dedicated FINRA Securities Helpline for Seniors[®]—available at (844) 57-HELPS—to provide senior investors and their family members with a supportive place to get assistance from specially trained FINRA staff related to concerns they have with their brokerage accounts and investments;
- Collaborating with NASAA and the SEC to address senior investor protection, including issuing a Senior Safe Act Fact Sheet designed to raise awareness among member firms, investment advisers and transfer agents about the Act and its immunity provisions;⁷¹
- Producing and presenting on in-person and virtual panels addressing senior investor protection with the SEC, state securities regulators, NASAA, APS offices, NAPSA, FBI and other agencies; and
- Meeting with adult protective services staff in multiple states, in part through NAPSA, to increase coordination of senior investor protection efforts and highlight FINRA Rule 2165’s provision that APS can direct a member firm to terminate or extend a temporary hold authorized by the Rule.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove such proposed rule change, or

Brokerage Account Assets on Death, and Seniors Beware: What You Should Know About Life Settlements; and FINRA’s Retirement webpage for investors.

⁷¹ See http://www.finra.org/sites/default/files/senior_safe_act_factsheet.pdf.

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-FINRA-2021-016 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2021-016. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3

p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2021-016 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁷²

J. Matthew DeLesDernier
Assistant Secretary

⁷² 17 CFR 200.30-3(a)(12).