

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-94061; File No. SR-FINRA-2021-016)

January 25, 2022

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

I. Introduction

On June 9, 2021, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“SEC” or “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend FINRA Rule 2165 (Financial Exploitation of Specified Adults) to: (1) permit member firms to place a temporary hold on a securities transaction, subject to the same terms and restrictions applicable to a temporary hold on disbursements of funds or securities (“disbursements”), where there is a reasonable belief of financial exploitation of a “specified adult” as defined in the rule;<sup>3</sup> (2) permit member firms to extend a temporary hold, whether on a disbursement or a transaction, for an additional 30 business days, if the member firm has reported the matter to a state regulator or agency of competent jurisdiction, or a court of competent jurisdiction (hereinafter collectively referred to as a “State Authority”); and, (3) require member firms to retain records of the reason and support for any extension of any temporary hold, including information regarding any communications with, or by, a State Authority.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See infra note 10 and accompanying text.

The proposed rule change was published for comment in the Federal Register on June 28, 2021.<sup>4</sup> On July 20, 2021, FINRA consented to extend until September 24, 2021, the time period in which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.<sup>5</sup> On August 23, 2021, FINRA responded to the comment letters received in response to the Notice.<sup>6</sup> On September 22, 2021, the Commission filed an Order Instituting Proceedings (“OIP”) to determine whether to approve or disapprove the proposed rule change.<sup>7</sup> On November 2, 2021, FINRA responded to the comment letters received in response to the OIP.<sup>8</sup> On December 6, 2021, FINRA consented to extend until February 23, 2022 the time period in which the Commission must approve or disapprove the proposed rule change.<sup>9</sup> This order approves the proposed rule change.

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<sup>4</sup> See Exchange Act Release No. 92225 (June 22, 2021), 86 FR 34084 (June 28, 2021) (File No. SR-FINRA-2021-016) (“Notice”).

<sup>5</sup> See letter from Jeanette Wingler, Associate General Counsel, FINRA, to Lourdes Gonzalez, Assistant Chief Counsel – Sales Practices, Division of Trading and Markets, Commission, dated July 20, 2021, available at <https://www.finra.org/sites/default/files/2021-07/SR-FINRA-2021-016-Extension1.pdf>.

<sup>6</sup> See letter from Jeanette Wingler, Associate General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated August 23, 2021 (“FINRA Response Letter 1”), available at <https://www.sec.gov/comments/sr-finra-2021-016/srfinra2021016-9160159-247786.pdf>.

<sup>7</sup> See Exchange Act Release No. 93103 (September 22, 2021) 86 FR 53696 (September 28, 2021) (File No. SR-FINRA-2021-016) (“OIP”).

<sup>8</sup> See letter from Jeanette Wingler, Associate General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated November 2, 2021 (“FINRA Response Letter 2”), available at <https://www.sec.gov/comments/sr-finra-2021-016/srfinra2021016-9363745-261806.pdf>.

<sup>9</sup> See letter from Jeanette Wingler, Associate General Counsel, FINRA, to Lourdes Gonzalez, Assistant Chief Counsel – Sales Practices, Division of Trading and Markets, Commission, dated December 6, 2021, available at <https://www.finra.org/sites/default/files/2021-12/sr-finra-2021-016-extension2.pdf>.

## II. Description of the Proposed Rule Change

### A. **Background**

FINRA's proposed rule change would amend Rule 2165, which currently permits a member firm to place a temporary hold on a disbursement from the account of a "specified adult" customer for up to 25 business days if the criteria of the rule are satisfied. A "specified adult" is someone either age 65 and older, or age 18 and older if the member firm reasonably believes that a mental or physical impairment has rendered the person incapable of protecting their own interests.<sup>10</sup> According to FINRA, temporary holds on disbursements have played a significant role in providing member firms with a way to respond promptly to suspicions of customer financial exploitation before a customer experiences potentially significant losses.<sup>11</sup>

A member firm's ability to place a temporary hold on disbursements is subject to a number of conditions that are designed to help prevent misapplication of the rule.<sup>12</sup> The safeguards include requiring that member firms provide notification of both the hold, and the reason for the hold, to all parties authorized to transact business on the customer's account, including the customer and any trusted contact person of the customer, no later than two business

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<sup>10</sup> 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 their own interests may be based on the facts and circumstances observed in the member firm's business relationship with the person. See Notice at 34086 n.17.

<sup>11</sup> See Notice at 34086. For example, according to FINRA member firms have placed temporary holds to prevent senior investors from losing: (1) \$200,000 (representing approximately two-thirds of the investor's account) related to a Central Intelligence Agency lawsuit scam; (2) \$10,000 in a lottery scam; (3) \$60,000 in a romance scam; and (4) \$50,000 to financial exploitation by a brother-in-law. Id.

<sup>12</sup> See Notice at 34086.

days after the day on which the firm first placed the hold.<sup>13</sup> In addition, after placing the hold the member firm must immediately initiate an internal review of the facts and circumstances that caused the firm to reasonably believe that the financial exploitation of the specified adult has occurred, is occurring, has been attempted, or will be attempted.<sup>14</sup> Furthermore, the general supervisory and recordkeeping requirements of certain FINRA Rules<sup>15</sup> require a member firm relying on Rule 2165 to establish and maintain written supervisory procedures that are 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.<sup>16</sup> With respect to associated persons who may be handling the customer's account, Rule 2165 also requires that any request for a hold be escalated to a supervisor, compliance department or legal department rather than allowing the associated person to independently place a hold.<sup>17</sup> In addition, a member firm relying on the rule is required to develop and document training policies or programs reasonably designed to ensure that such associated persons comply with the requirements of the rule,<sup>18</sup> as well as retain records related to compliance with the rule, which must be made readily available to FINRA upon request.<sup>19</sup> With respect to the specific disbursements on which a hold may be placed, temporary holds pursuant to Rule 2165 may only be placed where the member has a reasonable belief of

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<sup>13</sup> See Rule 2165(b)(1)(B).

<sup>14</sup> See Rule 2165(b)(1)(C).

<sup>15</sup> See Rules 3110, 3120, 3130, 3150, and the Rule 4510 Series.

<sup>16</sup> See Rule 2165(c)(1).

<sup>17</sup> See Rule 2165(c)(2).

<sup>18</sup> See Supplementary Material .02 to Rule 2165.

<sup>19</sup> See Rule 2165(d).

customer financial exploitation—for example, a customer payment related to a commonly known scam, such as a lottery scam.<sup>20</sup> Each of these safeguards incorporated into Rule 2165 would apply equally to the proposed rule change permitting temporary holds on securities transactions.<sup>21</sup>

In August 2019, FINRA commenced a retrospective review to assess the effectiveness and efficiency of its rules and administrative processes designed to protect senior investors from financial exploitation, including Rule 2165.<sup>22</sup> FINRA stated that information gathered during the review supported the need for firms to have additional time to resolve matters arising from suspected financial exploitation, as well as extending the rule to allow firms to place securities transaction holds.<sup>23</sup>

The proposed rule change would expand upon Rule 2165 in both scope and temporal reach by: (1) expanding the scope of Rule 2165(b)(1) by permitting member firms to place a temporary hold on a securities transaction, in addition to the already-permitted hold on

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<sup>20</sup> See Notice at 34086.

<sup>21</sup> See Notice at 34088.

<sup>22</sup> According to FINRA, the retrospective review process had two phases: (1) the assessment phase and (2) the action phase. FINRA stated that during the assessment phase, it first sought comment via Regulatory Notice 19-27 (August 2019) on several questions with respect to addressing financial exploitation and other circumstances of financial vulnerability for senior investors. The assessment phase of this review included discussions during member exams in 2019 that focused on Rule 2165, as well as a survey of FINRA members on these issues. In addition, FINRA obtained input from several advisory committees comprising member firms of different sizes and business models, investor protection advocates, member firms, and trade associations. FINRA stated that it also obtained the perspective of its operating departments that help administer Rule 2165, and considered examination observations and findings involving senior issues. Finally, FINRA stated that it also developed an anonymous survey that was distributed to all member firms in the first quarter of 2020. See Notice at 34085.

<sup>23</sup> See Notice at 34087.

disbursements, where the conditions of the rule, including the member's reasonable belief of customer financial exploitation, are met;<sup>24</sup> (2) permitting member firms to extend the maximum time period for any temporary hold initiated pursuant to Rule 2165(b)(1) for an additional 30 business days, beyond the current maximum of 25 business days, if the firm has reported the matter to a State Authority;<sup>25</sup> and (3) requiring member firms to retain records of the reason and support for any extension of a temporary hold, including information regarding any communications with, or by, a State Authority.<sup>26</sup> According to FINRA, the proposed rule change is designed to protect investors and the public interest by strengthening the tools available to FINRA's member firms to combat the financial exploitation of vulnerable investors, which presents the potential for significant and longstanding harm to those investors.<sup>27</sup>

**B. Proposed Rule Change**

1. Proposed Temporary Hold on Securities Transactions in the Account of a Specified Adult (Proposed Rule 2165(b))

Rule 2165 currently permits member firms to place temporary holds on disbursements of funds or securities when the firm has a reasonable belief that the customer is being financially exploited.<sup>28</sup> Although this serves to stop funds or securities from leaving a customer's account, FINRA indicated that a hold on disbursements may be insufficient to protect certain investors

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<sup>24</sup> See proposed Rule 2165(b).

<sup>25</sup> See proposed Rule 2165(b)(4).

<sup>26</sup> See proposed Rule 2165(d).

<sup>27</sup> See Notice at 34087.

<sup>28</sup> See Rule 2165(b).

from financial exploitation with respect to their securities transactions.<sup>29</sup> Specifically, FINRA believes that even if a temporary hold is placed on the resulting disbursement out of a customer's account, the execution of the transaction may still subject the customer to significant, negative financial consequences.<sup>30</sup>

Accordingly, FINRA is proposing to amend Rule 2165 to permit firms to place a temporary hold on securities transactions when the firm has a reasonable belief that the customer is being financially exploited.<sup>31</sup> In accordance with the rule's current safe harbors for holds on disbursements,<sup>32</sup> the proposed rule change would permit, but not require, firms to place a hold on transactions in these circumstances. FINRA believes that the safeguards in Rule 2165<sup>33</sup> would help prevent misapplication of the rule with respect to temporary holds on disbursements, and would apply equally to temporary holds on transactions.<sup>34</sup>

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<sup>29</sup> For example, FINRA stated that Rule 2165 currently would not apply to a customer's order to sell his shares of a stock. However, FINRA elaborated that if a customer requested that the proceeds of a sale of shares of a stock be disbursed out of his or her 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. See Notice at 34087 at n.33.

<sup>30</sup> See Notice at 34087. For example, according to FINRA such customers may be subject to adverse tax consequences, early withdrawal penalties (such as surrender charges), or the inability to regain access to a sold investment that was subsequently closed to new investors. Id.

<sup>31</sup> See proposed Rule 2165(b).

<sup>32</sup> FINRA stated that 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 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. See Notice at 34086.

<sup>33</sup> See supra notes 11-20 and accompanying language.

<sup>34</sup> See Notice at 34086.

2. Proposed 30-Day Extension of the Temporary Hold Period (Proposed Rule 2165(b)(4))

Rule 2165 currently allows a member firm to place a temporary disbursement hold on a specified adult customer's account for up to 15 business days if the specified conditions required by the rule are satisfied, unless otherwise terminated or extended by a State Authority.<sup>35</sup> The member firm may extend that hold for an additional 10 business days, for a maximum of 25 business days total, if 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, unless otherwise terminated or extended by a State Authority.<sup>36</sup>

FINRA stated that although some matters can be quickly resolved after placing a temporary hold (e.g., by explaining to the customer that the activity and requested disbursement fit a commonly-known scam), other matters are more complex and may require additional time.<sup>37</sup> For example, a more complex matter like suspected financial exploitation of an elderly customer by a family member or caregiver may entail investigations by state regulators or agencies, or legal actions in a court, and thus may require additional time for firms to resolve since both the firm and the other parties investigating the matter need time to gather and share information.<sup>38</sup> In particular, FINRA stated that the average duration of an investigation for matters reported to the federal National Adult Maltreatment Reporting System (NAMRS) is 52.6 days.<sup>39</sup>

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<sup>35</sup> See Rule 2165(b)(2).

<sup>36</sup> See Rule 2165(b)(3).

<sup>37</sup> See Notice at 34088, 34092.

<sup>38</sup> See id.

<sup>39</sup> Id.



Accordingly, FINRA is proposing to amend Rule 2165 to permit firms to extend any temporary hold (of a securities transaction or disbursement) under the rule for an additional 30 business days provided that: (1) the member firm's internal review of the facts and circumstances supports the firm's reasonable belief that financial exploitation of the specified adult has occurred, is occurring, has been attempted, or will be attempted, and (2) the member firm has reported or provided notification of its reasonable belief to a State Authority.<sup>40</sup> Thus, firms would be able to extend a transaction or disbursement hold up to a maximum of 55 business days only in instances where they have externally reported the suspicious conduct.

### 3. Proposed Addition to Record Retention (Proposed Rule 2165(d))

Rule 2165(d) currently requires member firms to retain records related to compliance with the rule, which must be readily available to FINRA upon request. To evidence compliance with Rule 2165 in placing or extending a temporary hold (of a securities transaction or disbursement), FINRA is proposing to amend Rule 2165(d) 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 Authority.<sup>41</sup>

### III. Discussion and Commission Findings

After careful review of the proposed rule change, the comment letters, and FINRA's responses to the comments, the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that are

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<sup>40</sup> See proposed Rule 2165(b)(4). FINRA stated that the 30-business-day-hold period in proposed Rule 2165(b)(4) would be in addition to the 15-business-day-hold period in Rule 2165(b)(2) and the 10-business-day-hold period in Rule 2165(b)(3). See Notice at 34087 n.31.

<sup>41</sup> See proposed Rule 2165(d)(6).

applicable to a national securities association.<sup>42</sup> Specifically, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Exchange Act,<sup>43</sup> which requires, among other things, that FINRA rules 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.

A. **Temporary Holds on Securities Transactions in the Account of a Specified Adult (Proposed Rule 2165(b))**

The proposed rule change would amend Rule 2165 to permit firms to place a temporary hold on securities transactions when the firm has a reasonable belief that the customer is being financially exploited.

All commenters generally supported this aspect of the proposal.<sup>44</sup> For example, commenters asserted that extending Rule 2165 to cover securities transactions would provide

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<sup>42</sup> In approving this rule change, the Commission has considered the rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>43</sup> 15 U.S.C. 78o-3(b)(6).

<sup>44</sup> See letter to Vanessa Countryman, Secretary, Commission, from William A. Jacobson, Esq., Clinical Professor of Law and Director of Cornell Securities Law Clinic, Cornell University Law School, dated October 13, 2021 (“Cornell Clinic Letter”); letter to Vanessa Countryman, Secretary, Commission, from William Benson, National Policy Adviser, and Kendra Kuehn, National Policy Analyst, National Adult Protective Services Association (“NAPSA”), dated July 29, 2021 (“NAPSA Letter”); letter to Vanessa Countryman, Secretary, Commission, from Lisa Bleier and Marin Gibson, Securities Industry and Financial Markets Association (“SIFMA”), dated July 28, 2021 (“SIFMA Letter”); letter to Vanessa Countryman, Secretary, Commission, from Christine Lazaro, Director of the Securities Arbitration Clinic and, Professor of Clinical Legal Education, St. John’s University (the “St. John’s Clinic”), dated July 19, 2021 (“St. John’s Clinic Letter”); letter to Vanessa Countryman, Secretary, Commission, from Eversheds Sutherland (US) LLP on behalf of the Committee of Annuity Insurers (“CAI”), dated July 19, 2021 (“CAI Letter”); letter to Vanessa Countryman, Secretary, Commission, from Ron Long, Head of Aging Client Services, Wells Fargo (“Wells Fargo”), dated July 15, 2021 (“Wells Fargo Letter”).

additional tools that firms could use to protect senior investors from financial exploitation and its detrimental consequences.<sup>45</sup> One of these commenters further stated that the proposed rule change would “provide more clarity on the manner in which member firms can attempt to combat financial exploitation with respect to direct held securities products, such as variable annuities, that are not usually held in a brokerage account that has a disbursement [feature].”<sup>46</sup> Another commenter stated that expanding the rule to include temporary holds on transactions would allow member firms to protect their customers to a greater degree, noting that customers may be financially exploited with regard to transactions just as they are with disbursements, and additionally member firms are in the best position to identify common characteristics of scams and exploitation and to recognize red flags in individual customers’ accounts.<sup>47</sup> This commenter further stated that “[c]onsistent with this state law trend, FINRA’s proposal to now include temporary holds on securities transactions within 2165 will help protect against financial exploitation relating to purchases or sales, and thus protect senior investors from significant harm.”<sup>48</sup>

One commenter suggested that notwithstanding its general support for the proposed rule change as drafted, “more may be done to further protect senior investors” and requested that “FINRA further consider making the Rule proscriptive rather than permissive.”<sup>49</sup> In particular, this commenter stated that “small and mid-sized firms have declined to utilize the safe harbor

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<sup>45</sup> See CAI Letter at 2; NAPSA Letter at 1.

<sup>46</sup> CAI Letter at 2.

<sup>47</sup> See Cornell Clinic Letter at 2-3.

<sup>48</sup> Id. at 1.

<sup>49</sup> St. John’s Clinic Letter at 2.

offered by Rule 2165 because of concerns associated with litigation risks,”<sup>50</sup> and that investors “would benefit from a uniform national standard of mandated reporting where financial exploitation is suspected, even if placing a hold is not mandated.”<sup>51</sup>

In response, FINRA stated that permitting a member firm to use discretion in placing a temporary hold would allow for the judicious use of temporary holds to protect customers from financial exploitation.<sup>52</sup> FINRA stated that some states mandate reporting of suspected financial exploitation by financial institutions, including broker-dealers, within a specified period of time, and FINRA expects member firms to comply with all applicable state requirements, including reporting requirements.<sup>53</sup> FINRA further stated that where state reporting is not required, mandatory reporting of every temporary hold pursuant to Rule 2165 could lead to an inefficient or ineffective use of time and resources for state regulators and agencies, particularly where firms were able to quickly resolve matters by engaging a customer’s trusted contact person or using other tools.<sup>54</sup> For these reasons, FINRA declined amending the proposed rule change.

Permitting firms to impose a temporary hold on transactions where appropriate, in addition to the authority firms already have to impose temporary holds on disbursements, would provide an additional measure of protection to customers from the harmful impact of exploitative transactions, such as adverse tax consequences, early withdrawal penalties, or investing in securities that do not align with their investor profiles. A temporary hold on disbursements may not be sufficient to prevent or redress customer harm from financial exploitation in certain

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<sup>50</sup> Id.

<sup>51</sup> Id.

<sup>52</sup> See FINRA Response Letter 1 at 4.

<sup>53</sup> Id.

<sup>54</sup> Id.

instances, such as financial exploitation involving the purchase and sale of securities. Therefore, authorizing firms to place temporary holds on securities transactions represents an important mechanism to help firms prevent harmful financial consequences that could result from a customer being subject to an exploitative securities transaction. Moreover, FINRA’s approach, which balances the importance of reporting against the risk of an inefficient or ineffective use of time and resources for state regulators and agencies, is reasonable. In addition, the Commission expects firms to comply with applicable state laws mandating that firms report suspected financial exploitation. For these reasons, the Commission finds the proposed rule change is consistent with the protection of investors and in the public interest.

**B. Proposed 30-Day Extension of the Temporary Hold Period (Proposed Rule 2165(b)(4))**

The proposed rule change would permit firms to extend the temporary hold on disbursements or transactions authorized by this rule for an additional 30 business days where the member firm has reported or provided notification of the member’s reasonable belief of financial exploitation of a specified adult to a State Authority.

Several commenters suggested that more time is needed for the investigation of senior financial exploitation cases.<sup>55</sup> One commenter stated that compared to the average 52.6 day duration of an investigation for all cases reported to NAMRS, “financial exploitation investigations are often more complicated and time consuming” and thus the commenter recommended that the 30-business-day extension be treated only as a starting point, which could be revisited as more data become available.<sup>56</sup> Another commenter stated that data show “there

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<sup>55</sup> See CAI Letter; NAPSA Letter; SIFMA Letter.

<sup>56</sup> See NAPSA Letter at 1.

will still be a sizeable percentage of cases of potential financial exploitation that are not resolved in a timely manner, even with the 30-business day extension . . . so firms will still be in the unenviable position of determining whether to engage in the disbursement, or execute the securities transaction, prior to their ability to conclude the investigation and ensure that the customer has not been exploited.”<sup>57</sup> In addition, a commenter stated that because “[s]tate laws do not conform to the additional 30-business days granted under” the proposed rule change “firms will be forced to continue to wade through a patchwork of requirements.”<sup>58</sup> Therefore, this commenter recommended that FINRA work with state agencies and the courts to foster consistency with respect to the permitted timeframe, as well as review the timeline again in the future to assess its efficacy.<sup>59</sup>

In response, FINRA stated that the proposed rule change strikes a reasonable balance between giving member firms adequate time to investigate and contact the relevant parties, as well as to seek input from a State Authority if needed, while prohibiting an open-ended hold period.<sup>60</sup> FINRA emphasized that Rule 2165 already permits a temporary hold to be terminated or extended by a State Authority.<sup>61</sup> Furthermore, FINRA stated that it has met, and will continue to meet, with adult protective services (“APS”) staff in multiple states and NAPSA to increase the coordination of senior investor protection efforts and highlight Rule 2165’s provision that APS has the ability to direct a member firm to terminate or extend a temporary hold authorized

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<sup>57</sup> CAI Letter at 2-3.

<sup>58</sup> Id. at 2.

<sup>59</sup> Id. at 3.

<sup>60</sup> See FINRA Response Letter 1 at 3.

<sup>61</sup> Id.

by the Rule.<sup>62</sup> In addition, FINRA asserted that if the proposed hold period does not provide member firms with adequate time for investigation, FINRA may consider extending the temporary hold period in future rulemaking.<sup>63</sup>

Another commenter opposed the proposed extension of the temporary hold period because the basis for whether to exercise the 10-business-day extension currently permitted by the rule<sup>64</sup> and the proposed 30-business-day extension<sup>65</sup> would use different standards.<sup>66</sup> The commenter recommended that FINRA amend the proposed rule change to require that the basis for exercising both extensions require that an internal investigation support a reasonable belief in financial exploitation (the current standard for the 10-business-day extension).<sup>67</sup> The commenter also suggested that FINRA consolidate the two extensions into a single 40-business-day extension.<sup>68</sup>

In response, FINRA stated that, as with the 10-business-day extension currently provided under Rule 2165(b)(3), the 30-business-day extension would require that the member firm's internal review of the facts and circumstances support a reasonable belief of the existence of, or potential for, financial exploitation necessitating the temporary hold.<sup>69</sup> However, the additional 30-business-day extension also would require the firm to report or notify a State Authority.<sup>70</sup>

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<sup>62</sup> Id.

<sup>63</sup> See FINRA Response Letter 1 at 3-4.

<sup>64</sup> See Rule 2165(b)(3).

<sup>65</sup> See Proposed Rule 2165(b)(4).

<sup>66</sup> See Cornell Clinic Letter at 3.

<sup>67</sup> Id.

<sup>68</sup> Id.

<sup>69</sup> See FINRA Response Letter 2 at 2-3.

<sup>70</sup> See id. at 2.

The additional 30 business days would provide firms with additional time to resolve complex matters, often involving investigations by state regulators or agencies or legal actions in a court.<sup>71</sup> FINRA stated that it does not support consolidating the two extensions of the temporary hold into a single 40-business day extension because doing so would not differentiate between matters of varying complexity.<sup>72</sup> FINRA stated that the proposed rule change strikes 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.<sup>73</sup>

The commenter also opposed the proposed 30-business-day extension because “a non-overridable limit on customers’ ability to transact and disburse, even though temporary, unduly limits the customers autonomy, which does not strike the right balance of interests under the Exchange Act.”<sup>74</sup> Accordingly, the commenter recommended that FINRA provide a mechanism for customers to override the temporary hold in limited circumstances, since customers may be aware of the risks and choose to proceed nonetheless.<sup>75</sup>

In response, FINRA stated that customers are given opportunities to help resolve any circumstance giving rise to a temporary hold. For instance, FINRA stated that unless a member firm reasonably believes that doing so would cause further harm to a specified adult, FINRA encourages the firm to attempt to resolve the matter with a customer before placing a temporary hold.<sup>76</sup> In addition, FINRA stated that Rule 2165(b)(1)(B)(i) requires that, not later than two

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<sup>71</sup> See id. at 3.

<sup>72</sup> See id.

<sup>73</sup> Id.

<sup>74</sup> Cornell Clinic Letter at 3

<sup>75</sup> See id.

<sup>76</sup> See FINRA Response Letter 2 at 3.



days after placing a temporary hold, the firm notify all persons authorized to transact business on the account, including the customer.<sup>77</sup> FINRA stated, however, that allowing a customer to “override a temporary hold when the member firm has a reasonable belief that the customer is being financially exploited would give a powerful tool to the person exploiting the customer and deprive the member firm of a tool to address the exploitation.”<sup>78</sup> For example, the exploiter could direct the customer to override the hold so that the exploiter could access the customer’s funds.<sup>79</sup> For these reasons, FINRA declined amending the proposed rule change.

Providing firms with the ability to extend the temporary hold period from a maximum of 25 business days to 55 business days reasonably aligns with FINRA’s stated purpose of providing firms with additional time to resolve financial exploitation matters where circumstances warrant. FINRA has found that the average duration of an investigation for matters reported to NAMRS is 52.6 days, and the proposed rule change would extend the potential maximum duration of the hold to 55 business days—a sum that is more in line with the average amount of time needed to conduct an investigation. As FINRA noted, firms as well as the government or law enforcement entities that investigate suspected financial exploitation often need additional time to collect and share information in order to bring the investigation to resolution.<sup>80</sup> But if a State Authority determines that additional time is needed the proposed rule change permits it to further extend the temporary hold. Moreover, it is reasonable to condition a firm’s ability to extend the temporary hold for an additional 30 business days on the firm reporting the matter to a State Authority, given that the extension is a serious step for both the

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<sup>77</sup> Id.

<sup>78</sup> Id.

<sup>79</sup> Id.

<sup>80</sup> See supra notes 21 and 37-39 and accompanying text.

firm and affected customer. These additional requirements, combined with the existing safeguards incorporated into Rule 2165, should provide firms with an effective mechanism to obtain additional time that may be necessary to resolve suspected financial exploitation of specified adults.

Furthermore, allowing a customer to override a temporary hold when the firm has a reasonable belief that the customer is being financially exploited could potentially serve to aid the person who is exploiting the customer, while also potentially diminishing the effectiveness of the firm's means to address the exploitation. At the same time, a maximum hold time of no more than 55 business days, combined with other safeguards, would provide a reasonable upper limit on holds that serves to protect customers from being subject to unduly lengthy or even indefinite holds on transactions or disbursements. For these reasons, the Commission finds that the proposed 30-day extension of the temporary hold period is consistent with the protection of investors and in the public interests.

C. **Record Retention (Rule 2165(d))**

The proposed rule change would also extend Rule 2165's record retention obligation to temporary hold extensions by requiring firms to retain records of the reason and support for any extension of a temporary hold, including information regarding any communications with, or by, a State Authority—so that firms have a means to demonstrate compliance with the rule upon request by FINRA.

One commenter stated that retaining records that justify a reasonable belief of financial exploitation would help “justify the imposition of a protective temporary hold, justify limiting a customer's autonomy, justify the member firm's decision-making process, and ensure member

firms do not feel free to impose unnecessary holds.”<sup>81</sup> For these reasons, the commenter stated that the proposed record retention requirement would benefit member firms, customers and the public.<sup>82</sup>

FINRA’s determination to require firms to maintain records evidencing those communications so that they can demonstrate compliance with the rule upon FINRA’s request, as set forth in the proposed rule change, is reasonable. For these reasons, the Commission finds FINRA’s proposed rule change is consistent with the protection of investors and in the public interest.

**D. Additional Issues Raised by Commenters**

1. Cognitive Decline or Diminished Capacity

One commenter recommended that FINRA consider extending the Rule 2165 safe harbor to apply where there is a reasonable belief that the investor has an impairment that renders the individual unable to protect his or her own interests, irrespective of whether there is evidence the customer may be the victim of financial exploitation by a third party.<sup>83</sup>

In response, FINRA stated that it did not 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 because such an extension would give member firms too much discretion or would unfairly impede customer autonomy.<sup>84</sup> FINRA also stated that member firms are not well-positioned to determine if a customer is suffering from cognitive

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<sup>81</sup> Cornell Clinic Letter at 4.

<sup>82</sup> See id.

<sup>83</sup> See Wells Letter at 2.

<sup>84</sup> See FINRA Response Letter 1 at 5.

decline or diminished capacity.<sup>85</sup> However, FINRA reminded firms of the guidance it provided in this area in Regulatory Notice 20-34 to assist member firms and investors address issues related to cognitive decline and diminished capacity.<sup>86</sup>

The Commission finds that expanding the proposed rule change to capture investors with cognitive decline or diminished capacity where there is no evidence of financial exploitation is beyond the scope of this proposed rule change.

## 2. Investment Companies

One commenter recommended that the temporary hold rules apply to investment companies, such as mutual funds, noting that because these companies are often the custodian of the actual assets, “there is nothing to be done to hold the actual assets if the client goes to them directly and circumvents the broker-dealer.”<sup>87</sup>

In response, FINRA stated that the Commission, not FINRA, has jurisdiction over investment companies and their transfer agents and, in fact, has already addressed the commenter’s concern.<sup>88</sup> Furthermore, FINRA stated that based on discussions with SEC staff

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<sup>85</sup> Id.

<sup>86</sup> See FINRA Response Letter 1 at 5.

<sup>87</sup> NAPSA Letter at 1.

<sup>88</sup> See FINRA Response Letter 1 at 2. FINRA stated that Division of Investment Management staff issued a no-action letter in 2018 to the Investment Company Institute permitting 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. Specifically, the no-action letter stated 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. See also Investment Company Institute, SEC No-Action Letter (June 1, 2018).

regarding Section 22(e) of the Investment Company Act of 1940, FINRA does not believe that a broker-dealer's delay of a redemption of mutual fund shares pursuant to its customer's mutual fund redemption request, or of a disbursement of mutual fund redemption proceeds to its customer, in reliance on Rule 2165 as amended by the Proposal and based on a reasonable belief of financial exploitation of the customer would be imputed to the mutual fund, including where the broker-dealer is the fund's principal underwriter.<sup>89</sup>

In general, FINRA rules apply to all members and persons associated with a member. The term "member" means any registered broker-dealer whose regular course of business consists in actually transacting securities business that is admitted to membership in FINRA.<sup>90</sup> Therefore, the commenter's recommendation is beyond the scope of this proposed rule change.

In sum, for the above reasons, the Commission finds that the proposed rule change would strengthen the tools available to FINRA's member firms to combat the financial exploitation of vulnerable investors. In addition, the Commission finds that conditioning the ability to extend the temporary hold by requiring firms to report the matter to a specified external authority, as well as requiring firms to maintain records evidencing those communications, would aid in preventing misapplication of the rule, and complement the existing safeguards already present in Rule 2165. Accordingly, the Commission finds that the proposed rule change would facilitate a greater measure of protection for investors by providing firms with additional means to prevent customer harm by imposing temporary holds on securities transactions where appropriate, and

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<sup>89</sup> See letter from Jeanette Wingler, Associate General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated January 24, 2022, available at <https://www.sec.gov/comments/sr-finra-2021-016/srfinra2021016-20112614-265430.pdf>. See also Notice of Filing of Partial Amendment No. 1 and Order Granting Accelerated Approval of File No. SR-FINRA-2016-039, Securities Exchange Act Release No. 79964 (February 3, 2017), 82 FR 10059, 10066 (February 9, 2017).

<sup>90</sup> See FINRA Rule 0160(d)(10) and Article III, Section 1(a) of the FINRA Bylaws.

also by providing firms with additional time to resolve financial exploitation matters through extending the duration of a temporary hold when necessary. For these reasons, the Commission finds FINRA's proposed rule change is designed to protect investors and the public interest.

IV. Conclusion

IT IS THEREFORE ORDERED pursuant to Section 19(b)(2) of the Exchange Act<sup>91</sup> that the proposed rule change (SR-FINRA-2021-016) be, and hereby is, approved.

J. Matthew DeLesDernier

Assistant Secretary

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<sup>91</sup> 15 U.S.C. 78s(b)(2).