

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-79215; File No. SR-FINRA-2016-039)

November 1, 2016

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change to Amend Rule 4512 (Customer Account Information) and Adopt FINRA Rule 2165 (Financial Exploitation of Specified Adults)

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 19, 2016, Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“SEC,” or the “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: (1) amend FINRA Rule 4512 (Customer Account Information) to require members to make reasonable efforts to obtain the name of and contact information for a trusted contact person for a customer’s account; and (2) adopt new FINRA Rule 2165 (Financial Exploitation of Specified Adults) to permit members to place temporary holds on disbursements of funds or securities from the accounts of specified customers where there is a reasonable belief of financial exploitation of these customers.

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.

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

<sup>2</sup> 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

With the aging of the U.S. population, financial exploitation of seniors and other vulnerable adults is a serious and growing problem.<sup>3</sup> FINRA’s experience with the FINRA Securities Helpline for Seniors<sup>®</sup> (“Seniors Helpline”) has highlighted issues relating to financial exploitation of seniors and other vulnerable adults.<sup>4</sup> A number of reports and studies also have explored various aspects of this important topic.<sup>5</sup> Moreover, studies indicate that financial

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<sup>3</sup> See The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation, and Predation Against America’s Elders (June 2011) (discussing the increasing prevalence of elder financial abuse) (hereinafter “MetLife Study”). See also FINRA Investor Education Foundation, Financial Fraud and Fraud Susceptibility in the United States: Research Report from a 2012 National Survey (2013) (which found that U.S. adults age 65 and older are more likely to be targeted for financial fraud, including investment scams, and more likely to lose money once targeted) (hereinafter “FINRA Foundation Study”).

<sup>4</sup> See FINRA Launches Toll-Free FINRA Securities Helpline for Seniors (April 20, 2015). See also Report on the FINRA Securities Helpline for Seniors (December 2015) (stating that from its launch on April 20, 2015 until December 2015, the Seniors Helpline received more than 2,500 calls with an average call duration of nearly 25 minutes) (hereinafter “Seniors Helpline Report”).

<sup>5</sup> See, e.g., National Senior Investor Initiative: A Coordinated Series of Examinations, SEC’s Office of Compliance Inspections and Examinations and FINRA (April 15, 2015) (hereinafter “Senior Investor Initiative”); MetLife Study; and Seniors Helpline Report.

exploitation is the most common form of elder abuse.<sup>6</sup> Financial exploitation can be difficult for any investor, but it can be particularly devastating for seniors and other vulnerable adults, many of whom are living on fixed incomes without the ability to offset significant losses over time or through other means.<sup>7</sup> Financial exploitation can occur suddenly, and once funds leave an account they can be difficult, if not impossible, to recover, especially when they ultimately are transferred outside of the U.S.<sup>8</sup> Members need more effective tools that will allow them to quickly and effectively address suspected financial exploitation of seniors and other vulnerable adults. Currently, however, FINRA rules do not explicitly permit members to contact a non-account holder or to place a temporary hold on disbursements of funds or securities where there is a reasonable belief of financial exploitation of a senior or other vulnerable adult.

To address these issues, the proposed rule change would provide members with a way to quickly respond to situations in which they have a reasonable basis to believe that financial exploitation of vulnerable adults has occurred or will be attempted. FINRA believes that a member can better protect its customers from financial exploitation if the member can: (1) place a temporary hold on a disbursement of funds or securities from a customer's account; and (2)

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<sup>6</sup> See Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults, Board of Governors of the Federal Reserve System, Commodity Futures Trading Commission, Consumer Financial Protection Bureau, Federal Deposit Insurance Corp., Federal Trade Commission, National Credit Union Administration, Office of the Comptroller of the Currency and SEC (September 24, 2013) (hereinafter "Interagency Guidance") (citing Acierno, R., M. A. Hernandez, A. B. Amstadter, H. S. Resnick, K. Steve, W. Muzzy, and D. G. Kilpatrick, "Prevalence and Correlates of Emotional, Physical, Sexual and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study," American Journal of Public Health 100(2): 292-97; Lifespan of Greater Rochester, Inc., et al., Under the Radar: New York State Elder Abuse Prevention Study, (Rochester, NY: Lifespan of Greater Rochester, Inc., May 2011)) (hereinafter "New York State Elder Abuse Prevention Study").

<sup>7</sup> See Seniors Helpline Report.

<sup>8</sup> See Seniors Helpline Report.

notify a customer's trusted contact person when there is concern that, among other things, the customer may be the victim of financial exploitation. These measures will assist members in thwarting financial exploitation of seniors and other vulnerable adults before potentially ruinous losses occur. As discussed below, FINRA is proposing a number of safeguards to help ensure that there is not a misapplication of the proposed rule and that customers' ordinary disbursements are not disrupted.

A small number of states have enacted statutes that permit financial institutions, including broker-dealers, to place temporary holds on "disbursements" or "transactions" if financial exploitation of covered persons is suspected.<sup>9</sup> In addition, the North American Securities Administrators Association ("NASAA") created a model state act to protect vulnerable adults from financial exploitation ("NASAA model"). Due to the small number of state statutes currently in effect and the lack of a federal standard in this area, FINRA believes that the proposed rule change would aid in the creation of a uniform national standard for the benefit of members and their customers.

#### Trusted Contact Person

The proposed rule change would amend Rule 4512 to require members to make reasonable efforts to obtain the name of and contact information for a trusted contact person upon the opening of a non-institutional customer's account.<sup>10</sup> The proposed rule change would require that the trusted contact person be age 18 or older.<sup>11</sup> While the proposed rule change does

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<sup>9</sup> See, e.g., DEL. CODE ANN. tit. 31, § 3910 (2015); MO. REV. STAT. §§ 409.600-.630 (2015); WASH. REV. CODE §§ 74.34.215, 220 (2015); and IND. CODE ANN. § 23-19-4.1 (2016).

<sup>10</sup> See proposed Rule 4512(a)(1)(F).

<sup>11</sup> See proposed Rule 4512(a)(1)(F).

not specify what contact information should be obtained for a trusted contact person, a mailing address, telephone number and email address for the trusted contact person may be the most useful information for members.

The proposal does not prohibit members from opening and maintaining an account if a customer fails to identify a trusted contact person as long as the member made reasonable efforts to obtain a name and contact information.<sup>12</sup> FINRA believes that asking a customer to provide the name and contact information for a trusted contact person ordinarily would constitute reasonable efforts to obtain the information and would satisfy the proposed rule change's requirements.

Consistent with the current requirements of Rule 4512, a member would not need to attempt to obtain the name of and contact information for a trusted contact person for accounts in existence prior to the effective date of the proposed rule change ("existing accounts") until such time as the member updates the information for the account either in the course of the member's routine and customary business or as otherwise required by applicable laws or rules.<sup>13</sup> With respect to any account subject to the requirements of Exchange Act Rule 17a-3(a)(17) to periodically update customer records, a member shall make reasonable efforts to obtain or, if previously obtained, to update where appropriate the name of and contact information for a trusted contact person consistent with the requirements in Exchange Act Rule 17a-3(a)(17).<sup>14</sup>

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<sup>12</sup> See proposed Supplementary Material .06(b) to Rule 4512.

<sup>13</sup> See Rule 4512(b).

<sup>14</sup> See proposed Supplementary Material .06(c) to Rule 4512. The reference to the requirements of Rule 17a-3(a)(17) includes the requirements of Rule 17a-3(a)(17)(i)(A) in conjunction with Rule 17a-3(a)(17)(i)(D). In this regard, Rule 17a-3(a)(17)(i)(D) provides that the account record requirements in Rule 17a-3(a)(17)(i)(A) only apply to accounts for which the member, broker or dealer is, or has within the past 36 months

With regard to updating the contact information once provided for other accounts that are not subject to the requirements in Exchange Act Rule 17a-3, a member should consider asking the customer to review and update the name of and contact information for a trusted contact person on a periodic basis or when there is a reason to believe that there has been a change in the customer's situation.<sup>15</sup>

The proposed rule change would also require that, at the time of account opening, a member shall disclose in writing (which may be electronic) to the customer that the member or an associated person is authorized to contact the trusted contact person and disclose information about the customer's account to address possible financial exploitation, to confirm the specifics of the customer's current contact information, health status, or the identity of any legal guardian, executor, trustee or holder of a power of attorney, or as otherwise permitted by proposed Rule 2165. With respect to any account that was opened pursuant to a prior FINRA rule, a member shall provide this disclosure in writing, which may be electronic, when updating the information for the account pursuant to Rule 4512(b) either in the course of the member's routine and customary business or as otherwise required by applicable laws or rules.<sup>16</sup>

FINRA believes that members and customers will benefit from the trusted contact

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been, required to make a suitability determination under the federal securities laws or under the requirements of a self-regulatory organization of which it is a member.

<sup>15</sup> A customer's request to change his or her trusted contact person may be a possible red flag of financial exploitation. For example, a senior customer instructing his registered representative to change his trusted contact person from an immediate family member to a previously unknown third party may be a red flag of financial exploitation.

<sup>16</sup> See proposed Supplementary Material .06(a) to Rule 4512. A member would be required to provide the disclosure at account opening or when updating information for existing accounts pursuant to Rule 4512(b), even if a customer fails to identify a trusted contact person. Among other things, such disclosure may assist a customer in making an informed decision about whether to provide the trusted contact person information.

information in many different settings. For example, consistent with the disclosure, if a member has been unable to contact a customer after multiple attempts, a member could contact a trusted contact person to inquire about the customer's current contact information. Or if a customer is known to be ill or infirm and the member has been unable to contact the customer after multiple attempts, the member could contact a trusted contact person to inquire about the customer's health status. A member also could reach out to a trusted contact person if it suspects that the customer may be suffering from Alzheimer's disease, dementia or other forms of diminished capacity. A member could contact a trusted contact person to address possible financial exploitation of the customer before placing a temporary hold on a disbursement. In addition, as discussed below, pursuant to proposed Rule 2165, when information about a trusted contact person is available, a member must notify the trusted contact person orally or in writing, which may be electronic, if the member has placed a temporary hold on a disbursement of funds or securities from a customer's account, unless the member reasonably believes that the trusted contact person is engaged in the financial exploitation.<sup>17</sup>

The trusted contact person is intended to be a resource for the member in administering the customer's account, protecting assets and responding to possible financial exploitation. A member may use its discretion in relying on any information provided by the trusted contact person. A member may elect to notify an individual that he or she was named as a trusted contact person; however, the proposed rule change would not require such notification.

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<sup>17</sup> See proposed Rule 2165(b)(1)(B)(ii). With respect to disclosing information to the trusted contact person, Regulation S-P exempts from the Regulation's notice and opt-out requirements disclosures made: (A) to comply with federal, state, or local laws, rules and other applicable legal requirements; or (B) made with client consent, provided such consent has not been revoked. See 17 C.F.R §§ 248.15(a)(1) and (a)(7)(i). FINRA believes that disclosures to a trusted contact person pursuant to proposed Rule 2165 or 4512(a)(1)(F) would be consistent with Regulation S-P.

### Temporary Hold on Disbursement of Funds or Securities

The proposed rule change would permit a member that reasonably believes that financial exploitation may be occurring to place a temporary hold on the disbursement of funds or securities from the account of a “specified adult” customer.<sup>18</sup> The proposed rule change creates no obligation to withhold a disbursement of funds or securities where financial exploitation may be occurring. In this regard, Supplementary Material to proposed Rule 2165 would explicitly state that the Rule provides members 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 members exercise discretion in placing temporary holds on disbursements of funds or securities from the accounts of specified adults under the circumstances denoted in the Rule.<sup>19</sup> The proposed Supplementary Material would further state that the Rule does not require members to place temporary holds on disbursements of funds or securities from the account of a specified adult.<sup>20</sup>

FINRA believes that “specified adults” may be particularly susceptible to financial exploitation.<sup>21</sup> Proposed Rule 2165 would define “specified adult” as: (A) a natural person age

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<sup>18</sup> See proposed Rule 2165(b)(1). Members also must consider any obligations under FINRA Rule 3310 (Anti-Money Laundering Compliance Program) and the reporting of suspicious transactions required under 31 U.S.C. 5318(g) and the implementing regulations thereunder.

<sup>19</sup> See proposed Supplementary Material .01 to Rule 2165.

<sup>20</sup> See proposed Supplementary Material .01 to Rule 2165. FINRA understands that some members, pursuant to state law or their own policies, may already place temporary holds on disbursements from customers’ accounts where financial exploitation is suspected.

<sup>21</sup> See Senior Investor Initiative (noting the increase in persons aged 65 and older living in the United States and the concentration of wealth in those persons during a time of downward yield pressure on conservative income-producing investments). See also



65 and older;<sup>22</sup> or (B) a natural person age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests.<sup>23</sup> Supplementary Material to proposed Rule 2165 would provide that a member’s reasonable belief that a natural person age 18 and older has a mental or physical impairment that renders the individual unable to protect his or her own interests may be based on the facts and circumstances observed in the member’s business relationship with the person.<sup>24</sup> The proposed rule change would define the term “account” to mean any account of a member for which a specified adult has the authority to transact business.<sup>25</sup>

Because financial abuse may take many forms, FINRA has proposed a broad definition of “financial exploitation.” Specifically, financial exploitation would mean: (A) the wrongful or unauthorized taking, withholding, appropriation, or use of a specified adult’s funds or securities; or (B) any act or omission by a person, including through the use of a power of attorney,

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FINRA Foundation Study (noting that respondents age 65 and over were more likely to be solicited to invest in a potentially fraudulent opportunity (93%), more likely to engage with the offer (49%) and more likely to have lost money (16%) than younger respondents); MetLife Study (noting the many forms of vulnerability that “make elders more susceptible to [financial] abuse,” including, among others, poor physical or mental health, lack of mobility, and isolation); Protecting Elderly Investors from Financial Exploitation: Questions to Consider (February 5, 2015) (noting that one of the greatest risk factors for diminished capacity is age).

<sup>22</sup> See, e.g., Aging Statistics, U.S. Department of Health and Human Services Administration on Aging (referring to the “older population” as persons “65 years or older”); Senior Investor Initiative (noting the examinations underlying the report “focused on investors aged 65 years old or older”).

<sup>23</sup> See proposed Rule 2165(a)(1).

<sup>24</sup> See proposed Supplementary Material .03 to Rule 2165. A member also may rely on other sources of information in making a determination under proposed Rule 2165(a)(1) (e.g., a court or government agency order finding a customer to be legally incompetent).

<sup>25</sup> See proposed Rule 2165(a)(2).

guardianship, or any other authority, regarding a specified adult, to: (i) obtain control, through deception, intimidation or undue influence, over the specified adult's money, assets or property; or (ii) convert the specified adult's money, assets or property.<sup>26</sup>

The proposed rule change would permit a member to place a temporary hold on a disbursement of funds or securities from the account of a specified adult if the member reasonably believes that financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted.<sup>27</sup> A temporary hold pursuant to proposed Rule 2165 may be placed on a particular suspicious disbursement(s) but not on other, non-suspicious disbursements.<sup>28</sup> The proposed rule change would not apply to transactions in securities.<sup>29</sup>

The proposed rule change would require that a member's written supervisory procedures identify the title of each person authorized to place, terminate or extend a temporary hold on behalf of the member pursuant to Rule 2165. The proposed rule change would require that any such person be an associated person of the member who serves in a supervisory, compliance or legal capacity for the member.<sup>30</sup>

If a member places a temporary hold, the proposed rule change would require the

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<sup>26</sup> See proposed Rule 2165(a)(4).

<sup>27</sup> See proposed Rule 2165(b)(1)(A).

<sup>28</sup> FINRA recognizes that a single disbursement could involve all of the assets in an account.

<sup>29</sup> For example, the proposed rule change 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, then the proposed rule change could apply to the disbursement of the proceeds where the customer is a "specified adult" and there is reasonable belief of financial exploitation.

<sup>30</sup> See proposed Rule 2165(c)(2). This provision is intended to ensure that a member's decision to place a temporary hold is elevated to an associated person with appropriate authority.

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.<sup>31</sup> In addition, the proposed rule change would require the member to provide notification of the hold and the reason for the hold to all parties authorized to transact business on the account, including, but not limited to, the customer, and, if available, the trusted contact person, no later than two business days after the date that the member first placed the hold.<sup>32</sup> While oral or written (including electronic) notification would be permitted under the proposed rule change, a member would be required to retain records evidencing the notification.<sup>33</sup>

The proposed rule change does not preclude a member from terminating a temporary hold after communicating with either the customer or trusted contact person. FINRA believes that a customer's objection to a temporary hold or information obtained during an exchange with the customer or trusted contact person may be used in determining whether a hold should be placed or lifted. FINRA believes that while not dispositive members should weigh a customer's objection against other information in determining whether a hold should be placed or lifted.

While the proposed rule change does not require notifying the customer's registered representative of suspected financial exploitation, a customer's registered representative may be

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<sup>31</sup> See proposed Rule 2165(b)(1)(C).

<sup>32</sup> See proposed Rule 2165(b)(1)(B). FINRA understands that a member may not necessarily be able to speak with or otherwise get a response from such persons within the two-business-day period. FINRA would consider, for example, a member's mailing a letter, sending an email, or placing a telephone call and leaving a message with appropriate person(s) within the two-business-day period to constitute notification for purposes of proposed Rule 2165. Moreover, as further discussed herein, FINRA would consider the inability to contact a trusted contact person to mean that the trusted contact person was not available for purposes of the Rule.

<sup>33</sup> See proposed Rule 2165(d).

the first person to detect potential financial exploitation. If the detection occurs in another way, a member may choose to notify and discuss the suspected financial exploitation with the customer's registered representative.

For purposes of proposed Rule 2165, FINRA would consider the lack of an identified trusted contact person, the inability to contact the trusted contact person or a person's refusal to act as a trusted contact person to mean that the trusted contact person was not available. A member may use the temporary-hold provision under proposed Rule 2165 when a trusted contact person is not available.

The temporary hold authorized by proposed 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 sooner terminated or extended by an order of a state regulator or agency or court of competent jurisdiction.<sup>34</sup> In addition, provided that the member'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 proposed rule change would permit the member to extend the temporary hold for an additional 10 business days, unless sooner terminated or extended by an order of a state regulator or agency or court of competent jurisdiction.<sup>35</sup>

Proposed Rule 2165 would require members to retain records related to compliance with the Rule, which shall be readily available to FINRA, upon request. Retained records required by the proposed rule change are records of: (1) requests for disbursement that may constitute financial exploitation of a specified adult and the resulting temporary hold; (2) the finding of a

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<sup>34</sup> See proposed Rule 2165(b)(2).

<sup>35</sup> See proposed Rule 2165(b)(3).

reasonable belief that financial exploitation has occurred, is occurring, has been attempted or will be attempted underlying the decision to place a temporary hold on a disbursement; (3) the name and title of the associated person that authorized the temporary hold on a disbursement; (4) notification(s) to the relevant parties pursuant to the Rule; and (5) the internal review of the facts and circumstances supporting the member's reasonable belief that the financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted.<sup>36</sup>

The proposed rule change would require a member that anticipates using a temporary hold in appropriate circumstances to establish and maintain written supervisory procedures reasonably designed to achieve compliance with the Rule, including procedures on the identification, escalation and reporting of matters related to financial exploitation of specified adults.<sup>37</sup> The proposed rule change would require that the member's written supervisory procedures identify the title of each person authorized to place, terminate or extend a temporary hold on behalf of the member pursuant to the Rule.<sup>38</sup> The proposed rule change would also require a member that anticipates placing a temporary hold pursuant to the Rule to develop and document training policies or programs reasonably designed to ensure that associated persons comply with the requirements of the Rule.<sup>39</sup>

If the Commission approves the proposed rule change, FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60

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<sup>36</sup> See proposed Rule 2165(d).

<sup>37</sup> See proposed Rule 2165(c)(1).

<sup>38</sup> See proposed Rule 2165(c)(2).

<sup>39</sup> See proposed Supplementary Material .02 to Rule 2165.

days following Commission approval. The effective date will be no later than 180 days following publication of the Regulatory Notice announcing Commission approval.

## 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>40</sup> 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 relieving members from FINRA rules that might otherwise discourage them from exercising discretion to protect customers through placing a temporary hold on disbursements of funds or securities. Such a hold, combined with contacting a trusted contact person, also may assist these customers in stopping unwanted disbursements and better protecting themselves from financial exploitation.

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

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. All members would be subject to the proposed amendments to Rule 4512, so they would be affected in the same manner, and FINRA has narrowly tailored the requirements to minimize the impacts on members. Moreover, proposed Rule 2165 is a safe-harbor provision that permits, but does not require, members to place temporary holds on disbursements in appropriate circumstances.

The population of seniors and other vulnerable adults in the United States is large. According to the U.S. Department of Health and Human Services, the number of older Americans (persons 65 years of age or older) is estimated to be 44.7 million, slightly over 14%

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<sup>40</sup> 15 U.S.C. 78o-3(b)(6).

of the U.S. population.<sup>41</sup> Of these Americans, approximately 57%, just under 25.5 million individuals, are invested in the stock market.<sup>42</sup> Further, in a recent survey, 75% of older households—that is, those where the survey respondent was 65 years of age or older—reported having securities investments in retirement or taxable accounts. This compares to only 61% for households where the survey respondent was younger than 65.<sup>43</sup> These figures represent conservative estimates of the individuals who may be better protected by this proposed rule change as it excludes any estimate of other vulnerable adults along with the anticipated continued growth of the older population.

As noted above, the proposed rule change would provide members with a way to quickly respond to situations in which they have a reasonable basis to believe that financial exploitation of vulnerable adults has occurred or will be attempted. The proposed rule change not only better safeguards customers, to the extent that members today do not provide additional protections for specified adults, but also better protects those members that are already doing so. FINRA believes that the proposed rule change would protect investors by relieving members from FINRA rules that might otherwise discourage members from exercising discretion to protect customers through placing a temporary hold on disbursements of funds or securities. Such a hold, combined with notifying a trusted contact person, also may assist these customers in stopping unwanted disbursements and better protecting themselves from financial exploitation.

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<sup>41</sup> See Aging Statistics, U.S. Department of Health and Human Services Administration.

<sup>42</sup> See Gallup 2013 Economy and Personal Finance survey at <http://www.gallup.com/poll/162353/stock-ownership-stays-record-low.aspx>.

<sup>43</sup> See FINRA Investor Education Foundation's 2015 National Financial Capability Study (State-by-State Survey) at <http://www.usfinancialcapability.org/>.

FINRA does not believe that the proposed rule change will impose undue operational costs on members. The proposed amendments to Rule 4512 would require members to attempt to collect the name and contact information for a trusted contact person at the time of account opening or, with respect to existing accounts, in the course of the member's routine and customary business. Members also would incur additional responsibilities to provide disclosure about the member's right to share certain personal information with the customer's trusted contact person.

While FINRA recognizes that there will be some operational costs to members in complying with the proposed trusted contact person requirement, FINRA has lessened the cost of compliance by not requiring members to notify the trusted contact person of his or her designation as such. Furthermore, the proposed rule change would permit a member to deliver the disclosure and notification required by Rule 4512 or 2165 in paper or electronic form thereby giving the member alternative methods of complying with the requirements.

In addition, there may be impacts with respect to legal risks and attendant costs to members that choose to rely on the proposed rule change in placing temporary holds on disbursements, although the direction of the impact is ambiguous. The proposed rule change may provide some legal protection to members if they are sued for withholding disbursements where there is a reasonable belief of financial exploitation as they can point to the rule as a rationale for their actions. At the same time, while proposed Rule 2165 creates no obligation to withhold disbursements where financial exploitation may be occurring or to refrain from opening or maintaining an account where no trusted contact person is identified, the proposed rule change might serve as a rationale for a private action against members that do not withhold disbursements when there is a reasonable belief of financial exploitation. To reduce the latter



risk, proposed Rule 2165 explicitly states that it provides members with a safe harbor from FINRA Rules 2010, 2150 and 11870 when members exercise discretion in placing temporary holds on disbursements of funds or securities, but does not require members to place such holds.

To the extent that members today have reasons to suspect financial exploitation of their customers, they may make judgments with regard to withholding disbursements of funds or securities. As such, these members may already face litigation risk with regard to their actions, whether or not they choose to disburse funds or securities, and without the benefit of a rule that supports their actions.

In developing the proposed rule change, FINRA considered several alternatives to help to ensure that it is narrowly tailored to achieve its purposes described previously without imposing unnecessary costs and burdens on members or resulting in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change addresses many of the concerns noted by commenters in response to the proposal published for public comment in Regulatory Notice 15-37 (“Notice 15-37 Proposal”).

First, the Notice 15-37 Proposal would have prohibited a person who is authorized to transact business on an account from being designated a customer’s trusted contact person under Rule 4512(a)(1)(F). Commenters raised concerns that this restriction may prohibit trustees or individuals with powers of attorney from being designated as trusted contact persons. In response to these comments, FINRA agrees that prohibiting persons authorized to transact business on an account from being designated a trusted contact person could present an overly restrictive burden on some customers. Accordingly, FINRA has proposed removing the prohibition on trusted contact persons being authorized to transact business on an account so as

to permit joint accountholders, trustees, individuals with powers of attorney and other natural persons authorized to transact business on an account to be designated as trusted contact persons.

Second, under the Notice 15-37 Proposal, the temporary hold on disbursements of funds or securities would have expired not later than 15 business days after the date that the hold was initially placed, unless sooner terminated or extended by an order of a court of competent jurisdiction. Provided that the member's internal review of the facts and circumstances supported the reasonable belief of financial exploitation, the Notice 15-37 Proposal would have permitted the temporary hold to be extended for an additional 15 business days, unless sooner terminated by an order of a court of competent jurisdiction. FINRA has proposed revising the time periods to up to 15 business days in the initial period and up to 10 business days (down from 15 business days) in any subsequent period. The shortened overall period responds to commenters' concerns about disbursement delays and better aligns proposed Rule 2165 with the NASAA model. The proposed subsequent period of up to 10 business days provides members with an additional period to address the issue if concerns about financial exploitation exist after the initial period, during which time the member must contact account holders and perform an appropriate investigation. FINRA believes that the proposed time periods are appropriately tailored to provide members with an adequate time period to address concerns about financial exploitation, while also responding to commenters' concerns about disbursement delays.

Third, the Notice 15-37 Proposal incorporated the concept of the temporary hold being terminated or extended by an order of a court of competent jurisdiction. In response to comments, FINRA agrees that the Notice 15-37 Proposal may be considered overly narrow in not permitting temporary holds to be terminated or extended by a state regulator or agency of competent jurisdiction in addition to a court of competent jurisdiction. In light of the important

role of state regulators and agencies in dealing with financial exploitation, FINRA has revised proposed Rule 2165 to incorporate the concept of a temporary hold being terminated or extended by a state regulator or agency in addition to a court of competent jurisdiction.

Fourth, the Notice 15-37 Proposal would have required a qualified person to place a temporary hold pursuant to proposed Rule 2165. Commenters suggested that the member should place a temporary hold, not the qualified person. In response to comments, FINRA has revised proposed Rule 2165 to provide that the member would place a hold under the rule. As revised, proposed Rule 2165 also would require that a member's written supervisory procedures identify the title of each person authorized to place, terminate or extend a temporary hold on behalf of the member pursuant to Rule 2165, and that any such person be an associated person of the member who serves in a supervisory, compliance or legal capacity for the member. In addition, proposed Rule 2165 would require that a member's records include the name and title of the associated person that authorized the temporary hold on a disbursement. FINRA believes that the revised proposed rule change is appropriately tailored to apply the obligations at the member-level, while preserving a role for associated persons serving in a supervisory, compliance or legal capacity in placing, terminating or extending the hold on behalf of the member.

Fifth, the Notice 15-37 Proposal would have required that the supervisory, compliance or legal capacity be "reasonably related to the account" in question. Commenters raised concerns over how they should determine whether the capacity was reasonably related to the account, citing in particular some members' practice of using a centralized group to respond to senior or fraud issues. After considering these comments, FINRA is now proposing to eliminate the requirement that the supervisory, compliance or legal capacity be "reasonably related to the account."

Sixth, under the Notice 15-37 Proposal, if the trusted contact person was not available or the member reasonably believed that the trusted contact person was involved in the financial exploitation of the specified adult, the member would have been required to contact an immediate family member, unless the member reasonably believed that the immediate family member was involved in the financial exploitation of the specified adult. Some commenters raised operational and privacy concerns regarding disclosing information to an immediate family member who the customer did not designate as a trusted contact person. In response to comments, FINRA has proposed removing the requirement to contact an immediate family member under proposed Rule 2165.

For these reasons, FINRA believes that the proposed rule change would strengthen FINRA's regulatory structure and provide additional protection to investors without imposing any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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 15-37 (October 2015). FINRA received 40 comment letters in response to the Notice 15-37 Proposal. A copy of Notice 15-37 is attached as Exhibit 2a to this filing.<sup>44</sup> Copies of the comment letters received in response to Notice 15-37 are attached as Exhibit 2c to this filing.<sup>45</sup> The comments and FINRA's responses are set forth in detail below.

General Support and Opposition to the Notice 15-37 Proposal

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<sup>44</sup> Exhibits to File No. SR-FINRA-2016-039 are available on FINRA's website at <http://www.finra.org>, at the principal office of FINRA, and at the Commission's Public Reference Room.

<sup>45</sup> See Exhibit 2b to this filing for a list of abbreviations assigned to commenters.

Twenty-seven commenters supported FINRA's efforts to protect seniors and other vulnerable adults but did not support all aspects of the proposal.<sup>46</sup> Chambers supported the proposal as promoting investor protection and preventing fraud in customer accounts. Twelve commenters raised significant concerns about the proposal.<sup>47</sup>

FINRA has considered the concerns raised by commenters and, as discussed in detail below, has addressed many of the concerns noted by commenters in response to the Notice 15-37 Proposal. Seniors are constantly subjected to a spectrum of exploitation scams, including scams centered on financial exploitation.<sup>48</sup> FINRA believes that the proposed rule change is needed to provide members with a defined way to respond to situations where there is a reasonable belief of financial exploitation of seniors and other vulnerable adults, including the ability to share customer information with a trusted contact person. Furthermore, the proposed rule change would promote investor protection by providing members with a safe harbor from FINRA rules that might otherwise discourage them from exercising discretion to protect customers through placing a temporary hold on disbursements of funds or securities.

As noted above, studies indicate that financial exploitation is the most common form of

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<sup>46</sup> See Cowan, IJEC, NAELA, CFA Institute, GSU, Commonwealth, NAPSA, ICI, PIABA, CAI, Cetera, Lincoln, Miami Investor Rights Clinic, PIRC, AARP, Wells Fargo, NASAA, FSI, SIFMA, Coughlin, Yaakov, IRI, First U.S. Community Credit Union, NAIFA, Alzheimer's Assoc., BDA and GWFS.

<sup>47</sup> See FSR, FIBA, Thomson, Girdler, Christian Financial Services, Rich, Stoehr, Ros, Hayden, Anderson, Liberman and Pisenti.

<sup>48</sup> See, e.g., New York State Elder Abuse Prevention Study (stating that financial exploitation was the most common form of mistreatment self-reported by study respondents); and National Adult Protective Services Association: Policy & Advocacy – Elder Financial Exploitation (discussing the widespread nature of financial exploitation of seniors and vulnerable adults) available at <http://www.napsa-now.org/policy-advocacy/exploitation/>.

elder abuse and is a growing concern.<sup>49</sup> A member's relationship with its customers and its knowledge of customers' accounts and financial situations may enable the member to detect unusual account activity or other indicators of possible financial exploitation. However, due to uncertainty about the ability to place holds on disbursements under FINRA rules or privacy-related concerns about sharing customer information, members may be unsure how to proceed when there is a reasonable belief of financial exploitation.

#### Safe Harbor

Proposed Rule 2165 would provide members with a safe harbor from FINRA Rules 2010, 2150 and 11870 when members exercise discretion in placing temporary holds on disbursements of funds or securities from accounts of specified adults under the circumstances denoted in the Rule.

FSI supported providing a safe harbor when members choose to place temporary holds on disbursements of funds or securities from the account of a specified adult. CFA Institute supported providing a safe harbor, but stated that FINRA should encourage, not just permit, members to make use of the safe harbor. Rather than providing a safe harbor when members choose to place temporary holds, three commenters supported requiring members to place temporary holds where there is a reasonable belief of financial exploitation.<sup>50</sup> PIABA further supported penalizing members for willfully ignoring evidence of financial exploitation.

The proposed rule change retains the approach in the Notice 15-37 Proposal. FINRA believes that a member can better protect its customers from financial exploitation if the member

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<sup>49</sup> See supra notes 3 and 6.

<sup>50</sup> See GSU, PIABA and Miami Rights Clinic.

can use its discretion in placing a temporary hold on a disbursement of funds or securities from a customer's account.

Other commenters supported expanding the scope of the safe harbor. CAI supported expanding the scope of the safe harbor to explicitly extend to situations in which: (1) a name and contact information for a trusted contact person has not been obtained for an existing account; and (2) the member was not able to obtain a name and contact information for a trusted contact person for an account. If, despite reasonable efforts, the member is unable to obtain or the customer declines to provide the name and contact information for a trusted contact person, FINRA would consider the trusted contact person to be "unavailable" for purposes of proposed Rule 2165. The unavailability of a trusted contact person would not preclude a member from availing itself of the safe harbor in proposed Rule 2165. Furthermore, for existing accounts, a member may avail itself of the safe harbor even if the member had not yet sought to obtain trusted contact person information in the course of its routine and customary business.

FIBA supported expanding the scope of the safe harbor to explicitly cover a decision by a member that a temporary hold is not appropriate, as well as the due diligence process leading to the decision. Similarly, SIFMA suggested that the scope of the safe harbor be extended to cover the final decision of a member that financial exploitation of a specified adult has occurred. FINRA does not interpret the proposed safe harbor from FINRA rules to cover final decisions by members that financial exploitation does or does not exist. Rather, proposed Rule 2165 provides members with a safe harbor from FINRA rules when members exercise discretion in placing temporary holds on disbursements of funds or securities from the account of a specified adult. FINRA believes that the proposal is appropriately tailored to provide members with a defined way of addressing possible financial exploitation.

SIFMA suggested that the safe harbor approach should recognize that members have the ability to develop and implement alternative protection structures under existing law (e.g., a customer's right to voluntarily enter into an alternative protection structure through agreement with the member). The safe harbor approach in proposed Rule 2165 does not preclude members from developing or implementing alternative protection structures consistent with existing law and FINRA rules.

Two commenters requested that FINRA clarify to which rules the safe harbor would apply.<sup>51</sup> In response to these comments, FINRA modified proposed Rule 2165, which now explicitly states that it provides 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).

Three commenters supported extending the safe harbor protection of proposed Rule 2165 to associated persons of the member.<sup>52</sup> Proposed Rule 2165 would provide a safe harbor from FINRA rules for members and their associated persons when placing temporary holds on disbursements in accordance with the Rule.

BDA suggested that any associated person that acted in good faith not be subject to complaints reportable on Form U4 (Uniform Application for Securities Industry Registration or Transfer). The proposed safe harbor from FINRA rules would not extend to complaints about an associated person that are reportable on Form U4. An associated person may respond to any such complaints on Form U4, including with an explanation of actions taken pursuant to

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<sup>51</sup> See CAI and SIFMA.

<sup>52</sup> See Cetera, NAIFA and BDA.



proposed Rule 2165. The proposed safe harbor from FINRA rules also would not extend to reporting required pursuant to FINRA Rule 4530 (Reporting Requirements), although FINRA would consider whether a member or associated person had acted consistent with the proposed rule when FINRA assesses reported information about a hold on a disbursement.

NAIFA suggested that the reference to the safe harbor from FINRA rules be moved out of Supplementary Material and into the body of proposed Rule 2165. Because Supplementary Material is part of the rule, FINRA declines to move the reference as requested.

#### Alternative Approaches

FINRA requested comment in the Notice 15-37 Proposal regarding approaches other than the proposed rulemaking that FINRA should consider. Two commenters suggested that FINRA adopt a principles-based approach that would allow a member to develop policies and procedures to fit its business model.<sup>53</sup> FINRA declines to make the suggested change. The safe harbor approach in proposed Rule 2165 is optional for members. Moreover, FINRA believes that the safeguards outlined in the safe harbor approach are important so that the ability to place temporary holds is not abused.

Liberman suggested that FINRA consider alternatives to the proposed rule change, such as working more closely with authorities that are knowledgeable about financial exploitation of seniors. FINRA has long had a strong interest in issues related to financial exploitation of seniors and other vulnerable adults. FINRA has extensive knowledge about financial exploitation of seniors, including working with members, federal and state agencies, and senior groups, and in administering the Seniors Helpline. Based on that information, FINRA believes

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<sup>53</sup> See FSR and Lincoln.

that the ability to place temporary holds on disbursements is an important tool to guard against financial exploitation of seniors and other vulnerable adults.<sup>54</sup>

Pisenti suggested establishing a government hotline for members to provide information about customers and allowing the hotline's staffers to address the situation, including providing a reasonable time to delay disbursements under the guidance of the staffers. Certain states require reporting of suspected financial exploitation to adult protective services or another agency, and FINRA expects members to comply with these state reporting requirements. However, with the right tools, members may be able to more effectively serve as the first line of defense against financial exploitation of seniors and other vulnerable adults. As discussed above, financial exploitation can occur suddenly and cause irreversible damage to customers' assets if action is not taken before funds or securities are disbursed. The proposed rule change would thus provide members with a critical tool to further protect customers from financial exploitation by explicitly allowing members to place temporary holds on disbursements of funds or securities consistent with the rule's requirements.

Anderson suggested requiring that members monitor accounts of senior customers for possible fraud rather than permitting members to place temporary holds on disbursements. FINRA recognizes that allowing members to place temporary holds on disbursements of funds or securities may be viewed as a significant action. Accordingly, the proposed rule change would impose numerous safeguards to help ensure that temporary holds are used only in appropriate circumstances and for the protection of customers. FINRA believes that members understand the problem of financial exploitation and will act to address potential financial exploitation of

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<sup>54</sup> See also supra note 9 (regarding state laws) and NASAA model.

customers. A temporary hold would halt a potentially fraudulent disbursement or other problematic situation quickly, before significant harm to the customer occurs.

#### Reasonable Belief of Financial Exploitation

The proposed rule change would permit members to place a temporary hold on disbursements of funds or securities where there is a reasonable belief of financial exploitation of a specified adult. Cetera requested guidance as to what would constitute a reasonable belief of financial exploitation. Ros commented that the reasonable belief standard is vague.

Other commenters suggested alternatives to the reasonable belief standard. Cowen commented that the reasonable belief standard may be too high and suggested instead “substantial suspicion” of potential fraud or abuse as the standard. To cover red flags of financial exploitation, FSR suggested an alternative standard of a “reasonable basis to suspect the customer may be the subject of financial exploitation.” AARP suggested that FINRA consider requiring members and their associated persons to act with “reasonable care.”

FINRA believes that the proposed standard is appropriate in that it permits members to use their judgment, based on their assessment of the facts, to place temporary holds without requiring actual knowledge of financial exploitation. The reasonable belief standard is present in other FINRA rules (e.g., FINRA Rules 2040 (Payments to Unregistered Persons) and 2111 (Suitability)). The standard also is consistent with similar state statutes and the NASAA model.

While not required by the proposed rule change, members may find it beneficial to develop their own red flags to guide the formation of a reasonable belief of financial exploitation. Among the commonly identified red flags of potential financial exploitation are: (1) attempts to transfer money to engage in commonly known fraudulent schemes (e.g., foreign lottery schemes); (2) uncharacteristic attempts to wire securities or funds, particularly with a

customer who is unable to explain the attempts; (3) when a caretaker, relative, or friend of the customer requests disbursements on behalf of the customer without proper documentation; (4) abrupt increases in disbursements, particularly with a customer who is accompanied by another person who appears to be directing the disbursements; (5) attempted forgery of the customer's signature on account documentation or a power of attorney; and (6) a customer's unusual degree of fear, anxiety, submissiveness or deference related to another person. While not dispositive, red flags may be used by members to detect and prevent financial exploitation.

Three commenters suggested expanding the proposed rule change beyond financial exploitation of specified adults to permit temporary holds on disbursements of funds and securities when a customer is showing signs of diminished capacity.<sup>55</sup> FINRA appreciates that diminished capacity can make seniors especially vulnerable to financial exploitation and believes that the proposed rule would cover most situations involving questionable disbursements by customers suffering from such a condition. In many instances where a customer is suffering from diminished capacity and requests that a member make a potentially problematic disbursement, the member is likely to have a reasonable belief, at least initially, that financial exploitation may be occurring. For those situations where that may not be the case, FINRA recognizes that this is an important issue for future consideration.

#### Definition of "Specified Adults"

The proposed rule change would define "specified adults" to include: (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. FINRA requested comment in the Notice 15-37 Proposal regarding whether

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<sup>55</sup> See NAELA, Lincoln and Alzheimer's Assoc.

the ages used in the definition of “specified adult” in proposed Rule 2165 should be modified or eliminated.

Two commenters suggested extending the proposed rule change to apply to all customers and not be otherwise limited.<sup>56</sup> Cetera suggested raising the age in the proposed definition above 65, which it believes is under the age of retirement for many customers. Other commenters suggested lowering the age in the proposed definition from 65 to 60.<sup>57</sup> FINRA has proposed defining specified adults to include natural persons age 65 and older. Federal agencies, FINRA and NASAA have focused on persons age 65 and older for various senior initiatives.<sup>58</sup> Moreover, FINRA believes that the concentration of wealth among older investors makes this group more vulnerable to financial exploitation.<sup>59</sup> With regard to suggestions to extend coverage to all customers, the proposed rule, as discussed above, also would apply to natural 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 interest. FINRA believes that these two categories of “specified adults” appropriately protect those adults who are most vulnerable to financial exploitation and that they are therefore neither over nor under inclusive in scope.

Ros commented that the application of the proposed rule change to persons age 65 and older is an unreasonable intrusion into the financial affairs of competent adults. Proposed Rule 2165 would permit placing a temporary hold only where there is a reasonable belief of financial exploitation and only with regard to a specific disbursement(s). Given these limitations, FINRA

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<sup>56</sup> See Cowan and Thomson.

<sup>57</sup> See IRI, Wells Fargo, NASAA and SIFMA.

<sup>58</sup> See supra note 22. See also NASAA model.

<sup>59</sup> See supra note 21.

does not believe that the proposed rule change is an unreasonable intrusion into the financial affairs of customers.

NAPSA suggested revising the definition to cover natural persons age 60 and older or a natural person deemed vulnerable under a state's adult protective services statute. FINRA believes that this approach would present operational challenges for members as the customers covered by the definition would vary by jurisdiction. As such, FINRA declines to make the suggested change.

Girdler suggested that the definition of specified adult be modified to consider customer vulnerability due to circumstances beyond cognitive ability. In contrast, CAI suggested that, because of administrative challenges in implementing the definition, vulnerable adults should be removed from the definition. FINRA has proposed defining "specified adults" to include an adult who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests. FINRA declines to omit such individuals from the definition of specified adult; however, FINRA also declines at this time to expand the definition to include additional potentially vulnerable adults. FINRA recognizes that customers who do not have a physical or mental impairment may also be vulnerable; however, the proposed rule change is intended to cover those customers most susceptible to financial exploitation.

Some commenters requested that FINRA provide guidance as to what would constitute a mental or physical impairment covered by the proposed definition.<sup>60</sup> Members have reasonable latitude in determining whether there is a mental or physical impairment that renders an adult unable to protect his or her own interests for purposes of the Rule. A member may base such a

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<sup>60</sup> See SIFMA, Cetera and GWFS.

determination on the facts and circumstances observed in the member's business relationship with the person or on other sources of information, such as a court or government agency order.

SIFMA requested clarification as to whether the definition would cover temporary impairments, as well as permanent or chronic impairments. FINRA would consider the proposed rule change to apply to temporary, as well as permanent or chronic impairments that render an adult unable to protect his or her own interests.

NAIFA suggested revising proposed Supplementary Material .03 to Rule 2165 to provide that a member's belief of a customer's impairment shall not create an assumption or implication that the member or its associated persons are qualified to make determinations about a customer's impairment. While FINRA declines to revise the proposed Supplementary Material as suggested, FINRA does not intend proposed Rule 2165 to create an assumption or implication that a member or its associated persons are qualified to make impairment determinations beyond the limited purposes of the proposed rule. A member's relationship with its customers and its knowledge of customers' accounts and financial situations puts the member in a unique position to thwart possible financial exploitation. The proposal will aid members in doing so.

CAI suggested that FINRA work with state regulators to ensure consistency between the proposed rule change and state requirements for members. As discussed below, while the proposed rule change and NASAA model are not identical, FINRA and NASAA have worked together to achieve consistency where possible and appropriate.

#### Definition of "Qualified Person"

In the Notice 15-37 Proposal, a "qualified person" was defined to include an associated person of a member who serves in a supervisory, compliance or legal capacity that is reasonably related to an account. FINRA requested comment in the Notice 15-37 Proposal regarding

whether the scope of the persons included in the definition of “qualified person” in proposed Rule 2165 be modified.

Some commenters suggested expanding the proposed definition to include all employees,<sup>61</sup> all associated persons<sup>62</sup> or all registered persons of a member.<sup>63</sup> GWFS suggested that the definition cover associated persons designated as qualified by the member. PIABA further suggested that, at a minimum, registered representatives should be required to report any suspicious behavior or conduct to a supervisor. FSR suggested that persons serving in a legal or compliance capacity not be included in the definition of “qualified person,” as such persons would seldom witness events that would provide a reasonable belief of financial exploitation.

Under the proposed rule change, a member’s written supervisory procedures shall identify the title of each person authorized to place, terminate or extend a temporary hold on behalf of the member pursuant to proposed Rule 2165. Furthermore, any such person shall be an associated person of a member who serves in a supervisory, compliance or legal capacity. While the benefits of preventing financial exploitation are significant to both the member and customer, placing a temporary hold on a disbursement is a serious action on the part of a member and may lead to difficult but necessary conversations with customers that could impact the member-customer relationship. Given the seriousness of placing a temporary hold on a disbursement, FINRA believes that it is reasonable to limit authority for placing holds on disbursements to a select group of individuals associated with the member and believes that persons serving in a

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<sup>61</sup> See NASAA.

<sup>62</sup> See Wells Fargo.

<sup>63</sup> See GSU and PIABA.



supervisory, compliance or legal capacity are well positioned to make these determinations on behalf of the member.

The scope of proposed Rule 2165(c)(2) does not cover registered representatives who are not otherwise serving in supervisory, compliance or legal capacities. FINRA recognizes that registered representatives may often be the first persons to notice behavior or conduct indicating financial exploitation. To encourage appropriate escalation of these matters, proposed Rule 2165(c)(1) would require that a member relying on proposed Rule 2165 establish and maintain written supervisory procedures related to the escalation of matters involving the financial exploitation of specified adults. As such, FINRA believes that it is reasonable to expect a registered representative to report any suspicious behavior or conduct to a supervisor or a person serving in a compliance or legal capacity.

Some commenters suggested clarifying or eliminating the requirement in the Notice 15-37 Proposal that the associated person serve in a supervisory, compliance or legal capacity that is “reasonably related to an account.”<sup>64</sup> In light of commenters’ concerns regarding how to determine whether a person is serving in a supervisory, compliance or legal capacity that is “reasonably related to an account,” FINRA has proposed eliminating the “reasonably related to an account” requirement.

To apply the obligations at the member-level, not the individual level, SIFMA suggested replacing “qualified person” with “member” in the provisions in proposed Rule 2165 related to the decision to place a temporary hold. FINRA has revised proposed Rule 2165 to provide that the member may place the hold on a disbursement, provided that the member’s written supervisory procedures identify the title of each person authorized to place, terminate or extend a

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<sup>64</sup> See FSR, BDA and SIFMA.

hold on behalf of the member and that each such person be serving in a supervisory, compliance or legal capacity for the member. In addition, proposed Rule 2165 would require that a member's records include the name and title of the associated person who authorized the temporary hold on a disbursement.

#### Definition of "Account"

The proposed rule change would define "account" to mean any account of a member for which a specified adult has the authority to transact business. FINRA requested comment in the Notice 15-37 Proposal regarding whether the definition of account should be expanded to include accounts for which a specified adult is a named beneficiary.

Some commenters supported expanding the definition of account to accounts for which a specified adult is a named beneficiary.<sup>65</sup> Commonwealth did not support expanding the definition to include accounts for which a specified adult is a named beneficiary. FINRA recognizes that members may not have current contact information for each named beneficiary. In addition, members may lack other critical information about beneficiaries that would preclude them from forming a reasonable belief that the beneficiaries are the subject of financial exploitation. Due to the operational challenges for members in applying the proposed rule to beneficiaries, FINRA has not proposed including accounts for which a specified adult is a named beneficiary.

BDA suggested excluding accounts where there is a designated guardian, custodian or power of attorney because such accounts should receive protection under FINRA rules beyond the scope of the safe harbor. If these accounts are included in the scope of the proposal, BDA suggested that members should be provided with a heightened level of protection when they

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<sup>65</sup> See IJEC, AARP and SIFMA.

suspect financial exploitation by a designated guardian, custodian or power of attorney “since the account holder themselves would have had to know that this person has transaction capacity for the account, resulting in an enhanced burden to the firm when suspicion arose.” It is not clear what heightened protections the commenter suggests for members with respect to accounts where there is a designated guardian, custodian or power of attorney. As discussed above, the proposed rule does not require members to place temporary holds on disbursements of funds or securities, and FINRA does not intend to provide through the proposed rule change additional protections on accounts where there is guardian, custodian or power of attorney.

#### Disbursements

The proposed rule change would permit members to place temporary holds on disbursements of funds or securities. The proposed rule change would not apply to transactions in securities. Some commenters supported extending the proposed rule change to apply to transactions in securities.<sup>66</sup> While the proposed rule change does not apply to transactions, FINRA may consider extending the safe harbor to transactions in securities in future rulemaking.

PIABA requested that the proposed rule change define “disbursement.” PIABA also requested that FINRA clarify that the temporary hold may be placed on particular disbursement(s). FINRA would consider a disbursement to include a movement of cash or securities out of an account. In addition, a temporary hold pursuant to proposed Rule 2165 may be placed on a particular suspicious disbursement(s) but not on other, non-suspicious disbursements (e.g., member may choose to place a hold on a questionable disbursement but not on a contemporaneous regular mortgage or tax payment where there is no reasonable belief of exploitation regarding such payment).

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<sup>66</sup> See IRI, FSR, Lincoln, SIFMA and FSI.

Two commenters requested that FINRA explicitly permit temporary holds on Automated Customer Account Transfer Service (“ACATS”) transfers under the proposed rule change.<sup>67</sup> For purposes of proposed Rule 2165, FINRA would consider disbursements to include ACATS transfers but, as with any temporary hold, a member would need to have a reasonable belief of financial exploitation in order to place a temporary hold on the processing of an ACATS transfer request pursuant to the Rule. FINRA also reminds members of the application of FINRA Rule 2140 (Interfering With the Transfer of Customer Accounts in the Context of Employment Disputes) to the extent that there is not a reasonable belief of financial exploitation.

FINRA recognizes that, depending on the facts and circumstances, placing a temporary hold on the processing of an ACATS transfer request could also lead the member to place a temporary hold on all assets in an account, for the same reasons. However, if a temporary hold is placed on the processing of an ACATS transfer request, the member must permit disbursements from the account where there is not a reasonable belief of financial exploitation regarding such disbursements (e.g., a customer’s regular bill payments). FINRA emphasizes that where a questionable disbursement involves less than all assets in an account, a member may not place a blanket hold on the entire account. Each disbursement must be analyzed separately.

While supporting the proposed rule change, Yaakov requested clarification about how the proposed rule change would apply to certain types of disbursements from a customer’s account. Specifically, Yaakov requested that the proposed rule change provide that disbursements would include payments from a customer’s account to a customer’s bank. Yaakov also requested that FINRA clarify whether a temporary hold may be placed on disbursements related to a customer’s checkbook, credit card or debit card associated with a brokerage account at a member. FINRA

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<sup>67</sup> See FSR and SIFMA.

would consider disbursements to include, among other things, questionable payments to a bank or other financial institution, credit/debit card payments or issued checks associated with a brokerage account at a member. However, members need to consider the recipient of the disbursement when determining whether there is a reasonable belief of financial exploitation. For example, a monthly disbursement to a customer's mortgage lender likely represents a lower risk of financial exploitation than a one-time, sizable disbursement to a non-U.S. person. In addition, the temporary hold is on the disbursement-level not the account-level, so that a member must permit a disbursement where there is not a reasonable belief of financial exploitation (e.g., a regular mortgage payment to a bank), but may place a temporary hold on another disbursement where there is a reasonable belief of financial exploitation.

CAI questioned whether the ability to place temporary holds on disbursements would conform to the requirements of Section 22(e) of the Investment Company Act of 1940 ("1940 Act") for redemptions of a redeemable security. CAI noted that the proposed rule change could be seen as reconcilable with the 1940 Act requirements to the extent that a disbursement request directed to a broker-dealer does not constitute a disbursement request to the issuer of a variable annuity. Section 22(e) of the 1940 Act generally prohibits registered funds from suspending the right of redemption, or postponing the date of payment or satisfaction upon redemption of any redeemable security for more than seven days after tender of such security to the fund or its agent, except for certain periods specified in that section. The safe harbor under proposed Rule 2165 applies to disbursements of proceeds and securities and does not apply to transactions, including redemptions of securities.

Most mutual fund customer accounts are serviced and record kept by intermediaries, such as broker-dealers. FINRA does not believe that a member's ability to place a hold on a

disbursement of proceeds from its customer's account under the proposed rule change creates a conflict with Section 22(e) of the 1940 Act as the mutual fund does not have a role in the disbursement from the customer's account held by an intermediary.

In certain limited circumstances, the customer's account may be maintained by a mutual fund's principal underwriter. In light of the role of the principal underwriter with respect to these accounts, the ability to place a temporary hold on a disbursement of proceeds under the proposed rule change may be viewed as conflicting with Section 22(e) of the 1940 Act.

#### Period of Temporary Hold

Under the Notice 15-37 Proposal, the temporary hold on disbursements of funds or securities would have expired not later than 15 business days after the date that the hold was initially placed, unless sooner terminated or extended by an order of a court of competent jurisdiction. In addition, provided that the member's internal review of the facts and circumstances supported the reasonable belief of financial exploitation, the Notice 15-37 Proposal would have permitted the temporary hold to be extended for an additional 15 business days, unless sooner terminated by an order of a court of competent jurisdiction. FINRA requested comment in the Notice 15-37 Proposal on whether the permissible time periods for placing and extending a temporary hold pursuant to proposed Rule 2165 should be modified.

Some commenters supported permitting longer time periods. IRI supported changing the time periods to 45 business days for the initial period and an additional 45 business days for any subsequent period. IRI also supported automatic extensions of the temporary hold upon notification to FINRA until such time that a court of competent jurisdiction or FINRA takes action.

First U.S. Community Credit Union commented that 15 business days may not be sufficient time for a member to obtain a court order or receive input from adult protective services. FIBA commented that the proposed time periods may not be sufficient, particularly for non-U.S. customers and suggested that FINRA create different time periods or establish different processes for non-U.S. customers. CAI suggested changing the time periods to 25 business days for the initial period to recognize the need to have adequate time at the outset and an additional 10 business days for any subsequent period.

FSR supported permitting members to place a temporary hold for any period of time within the reasonable discretion of the member or until a third party (e.g., a court of competent jurisdiction or adult protective services) notified the member that the hold has expired or subsequent events indicate that the threat of financial exploitation no longer exists.

Other commenters supported shorter time periods. AARP suggested that the temporary hold expire no later than 10 business days after the hold is placed. NASAA commented that the proposed time periods were too long. NASAA supported requiring both FINRA and state regulatory review of any extension of a temporary hold by a member.

FINRA has proposed revising the time periods to up to 15 business days in the initial period and up to 10 business days (down from 15 business days) in any subsequent period. These time periods are consistent with the NASAA model and the shortened extension period responds to commenters' concerns about disbursement delays. The proposed extension period of up to 10 business days provides members with a longer period to address the issue if concerns about financial exploitation exist after the initial period, during which time the member must contact persons authorized to transact business on the account and trusted contact persons, as available, and perform an appropriate investigation.

CFA Institute supported giving a member the ability to extend the temporary hold for an additional period if the member's internal review supported the additional time period. FINRA has tried to strike a reasonable balance in giving members adequate time to investigate and contact the relevant parties, as well as seek input from a state regulator or agency (e.g., state securities regulator or state adult protective services agency) or a court order if needed, but also not permitting an open-ended or overly long hold period in recognition of the seriousness of placing a temporary hold on a disbursement.

SIFMA supported the proposed time periods but suggested including language permitting the expiration or extension of the hold as otherwise permitted by state or federal law, through agreement with the specified adult or their authorized representative, or in accordance with prior written instructions or lawful orders, or sooner terminated or extended by an order of a court of competent jurisdiction. SIFMA also suggested that an investigating state government regulator or agency should be able to terminate or extend a hold on a disbursement. FINRA has revised proposed Rule 2165 to incorporate the concept of a temporary hold being terminated or extended by a state regulator or agency in addition to a court of competent jurisdiction.

FINRA has not revised proposed Rule 2165 to expressly permit lifting the hold "through agreement with the specified adult or their authorized representative, or in accordance with prior written client instructions or lawful orders." While the proposed rule change would not prohibit members from lifting a hold, for example, upon a determination that there is no financial exploitation, FINRA believes that the commenter's suggested language is overly broad (e.g., allowing an authorized representative to lift the hold may enable an abuser to lift the hold and gain access to the customer's funds).



Lincoln requested that FINRA provide guidance on what members should do after the expiration of the temporary hold. Alzheimer's Assoc. requested clarification on the process for lifting or extending a temporary hold. FINRA believes that the proposed time period of up to 25 business days total is sufficient time for a member to resolve an issue. Moreover, the proposed rule change allows the time to be further extended by a court or a state regulator or agency. If a member is unable to resolve an issue due to circumstances beyond its control, there may be circumstances in which a member may hold a disbursement after the period provided under the safe harbor. A member should assess the facts and circumstances to determine whether a disbursement is appropriate after the expiration of the period provided in the safe harbor.

BDA questioned whether the proposed rule change would only permit terminating the temporary hold with an order of a court of competent jurisdiction. The proposed rule change would not prohibit a member from lifting a hold without a court order, provided that the member would have to comply with an order of a court of competent jurisdiction or of a state regulator or agency terminating or extending a temporary hold.

ICI supported limiting the number of temporary holds that a member may place on an account during a calendar year or other specified period. FINRA declines to limit the number of holds that a member may place. However, taking into account a member's size and business, FINRA would closely examine a member that places an outsized number of holds on customer accounts to determine whether there was any wrongdoing on the part of the member.

#### Potential Harm

Some commenters expressed concern that permitting members to place temporary holds may result in customer harm. NAPSA supported allowing members to place temporary holds where there is a reasonable belief of financial exploitation but suggested that members be

required to take measures to ensure that any holds will not cause undue harm to customers (e.g., if a customer's payments are not made in a timely manner).

Some commenters questioned whether the proposed rule change would permit lifting a temporary hold if the customer disagrees with the hold.<sup>68</sup> Rich expressed concern that a temporary hold may result in a customer defaulting on legal or contractual obligations and supported a mechanism other than a court order for lifting the hold (e.g., the trusted contact person's approval to lift the hold). Liberman expressed concern that the proposed rule change could be abused by members in refusing to disburse funds or securities. ICI supported FINRA providing customers with recourse for lifting the temporary hold other than obtaining a court order and indicated that such recourse may limit a member's civil liability.

FINRA recognizes that placing 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 significant and 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. FINRA believes that the harm to customers of financial exploitation justifies permitting members to place temporary holds.

To minimize the potential harm to customers that may arise from unnecessarily holding customer funds, FINRA believes that members should consider the recipient of the disbursement in determining whether there is a reasonable belief of financial exploitation. As noted above, FINRA believes that members should weigh a customer's objection against other information in

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<sup>68</sup> See Stoehr and Hayden.

determining whether a hold should be placed or lifted. While not dispositive, a customer's objection and explanation may indicate to the member that the hold should be lifted.

FIBA commented that the proposed rule change does not explicitly contemplate the customer disagreeing with the temporary hold and that relying on a trusted contact person to maintain a hold may conflict with the interests of the customer. Although FINRA believes that a member may use its discretion in relying on any information provided by the trusted contact person, a member also must consider a customer's objection and explanation, as well as other pertinent facts and circumstances, in determining whether a hold should be maintained or lifted.

### Legal Risks

FINRA requested comment in the Notice 15-37 Proposal regarding members' current practices when they suspect financial exploitation has occurred, is occurring, has been attempted or will be attempted, including whether the proposed rules would change members' current practices. Commenters did not provide any information regarding their current practices when financial exploitation of a customer is suspected.

FINRA also requested comment in the Notice 15-37 Proposal on members' views on any potential legal risks associated with placing or not placing temporary holds on disbursements of funds or securities at present and under the proposal. Some commenters suggested that the proposed rule change creates legal risks for members in placing or not placing a temporary hold.

Christian Financial Services objected to the proposed rule change as making "a broker responsible for the behavior of an incapacitated senior" and that such a rule "invites lawsuits and abuse." GWFS commented that placing a temporary hold under the proposed rule change allows for discretion, which causes members to be more susceptible to litigation for acting or failing to

act. GWFS also commented that the proposed rule change does not provide “comprehensive immunity” from liability in a civil action.

Lincoln requested that FINRA expressly state that no private right of action is created by a member’s decision to place or not place a temporary hold. Cetera commented that the safe harbor under proposed Rule 2165 may not protect members from liability under state laws. NAIFA requested that the proposed rule change provide protection from liability for reporting financial exploitation to state regulators.

On the other hand, PIABA commented that FINRA should clarify that a private right of action would exist when a member willfully ignores evidence of abuse. Yaakov requested that FINRA state that members would not be “insure[d]” for liabilities that may be created by placing a temporary hold in good faith.

FINRA believes that members today make judgments with regard to making or withholding disbursements and already face litigation risks with respect to these decisions. The proposed rule change is designed to provide regulatory relief to members by providing a safe harbor from FINRA rules for a determination to place a hold. Some states may separately provide immunity to members under state law.

To mitigate any civil claims that a member had a duty to place a temporary hold, ICI suggested that FINRA clarify in proposed Rule 2165 that: (1) no member is required by FINRA to place a temporary hold; and (2) a member’s failure to place a temporary hold shall not be deemed an abrogation of the member’s duties under FINRA rules. FINRA believes that Supplementary Material .01 stating that proposed Rule 2165 is a safe harbor and that the Rule does not require placing holds clearly indicates that there is not a requirement to place a hold on a disbursement.

### Notifying Parties Authorized to Transact Business on the Account

Under the Notice 15-37 Proposal, proposed Rule 2165 would have required a member to provide notification of the hold and the reason for the hold to all parties authorized to transact business on the account no later than two business days after placing the hold.

PIRC supported requiring notification to all parties authorized to transact business on an account. SIFMA commented that the term “authorized to transact business on an account” is vague and can be expansive and burdensome. IRI commented that the requirement to notify all parties authorized to transact business on an account could result in a member being unable to place a temporary hold on a disbursement and suggested instead requiring that a member notify “any” party rather than “all” parties authorized to transact business on an account.

FINRA believes that each person authorized to transact business on an account should be notified that the member has placed a temporary hold on a disbursement from the account.<sup>69</sup> In the case of jointly held accounts, each person authorized to transact business on the account should be notified of the temporary hold on a particular disbursement.

There are a number of reasons why it is important to notify all persons authorized to transact business on the account. By reaching out to all persons authorized to transact business on an account, there is a greater likelihood of someone intervening to assist in thwarting the financial exploitation at an early stage. Moreover, persons authorized to transact business on an account would have a reasonable expectation that they would be contacted when a member places a temporary hold on a disbursement based on a reasonable belief that financial

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<sup>69</sup> See FINRA Rule 2090 (Know Your Customer) (requiring that members use reasonable diligence, in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer).

exploitation may be occurring. The notification requirement, moreover, should not impact a member's decision to place a hold as it is a post-hold obligation.

#### Trusted Contact Person

The proposed rule change would amend Rule 4512 to require members to make reasonable efforts to obtain the name of and contact information for a trusted contact person upon the opening of a non-institutional customer's account. In addition, under the Notice 15-37 Proposal, proposed Rule 2165 would have required the member to provide notification of the hold and the reason for the hold to the trusted contact person, if available, no later than two business days after placing the hold.

Some commenters supported requiring members to make reasonable efforts to obtain the name and contact information for a trusted contact person, as well as notification to the trusted contact person when a temporary hold is placed pursuant to proposed Rule 2165.<sup>70</sup> First U.S. Community Credit Union commented that the trusted contact person may be useful to members.

Ros and SIFMA suggested that members should have the option of seeking trusted contact person information rather than requiring it under Rule 4512. FINRA is mindful of the efforts that some members may need to undertake in order to comply with a requirement that they make reasonable efforts to obtain trusted contact person information. However, the benefits to both members and investors of having trusted contact person information when serious problems arise will be far greater. And the likelihood of members encountering situations when such information is necessary will continue to increase with the aging of our population. Moreover, trusted persons can assist members in any number of ways beyond the more serious situations of, for example, financial exploitation or diminished capacity. Members may find

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<sup>70</sup> See NAPSA, ICI, PIRC and FSI.

them helpful in administering accounts (e.g., where a customer has been unresponsive to multiple contact attempts).

CAI suggested that the requirement that members make reasonable efforts to obtain the name and contact information for a trusted contact person apply only when the customer is age 55 or older. Because members may place temporary holds in situations where financial exploitation is occurring to a customer younger than age 55 who is suffering from an incapacity, it is important that members seek to obtain trusted contact person information for all customers, not simply those age 55 or older.

Some comments related to the ability to have more than one trusted contact person. IJEC suggested revising the proposal to require more than one trusted contact person and that such persons be independent of each other. Cowan suggested the alternative approach of having a “protectors’ committee” consisting of several individuals for each account of a senior investor. SIFMA requested clarification on whether an organization or practice could be a trusted contact person and whether a customer could designate multiple contact persons. While FINRA declines to require more than one trusted contact person, the proposed rule change would not prohibit members from requesting or customers from naming more than one trusted contact person. Given the role of the trusted contact person and that the member is authorized to disclose information about the account to such person, FINRA does not believe that an organization or practice, such as a law firm or an accounting firm, could serve as the trusted contact person in the capacity intended by the proposed rule change. However, a customer could designate an attorney or an accountant as a trusted contact person.

SIFMA commented that the proposed rule change should contemplate situations where a customer orally notifies a member of the name and contact information for a trusted contact

person. Rule 4512 requires that the member maintain the trusted contact person's name and contact information, as well as the written notification to the customer that the member may contact the trusted contact person. The proposed rule change would allow members to rely on oral conversations with customers that members then document, provided that the written notification requirement of proposed Supplementary Material .06 to Rule 4512 is satisfied.

With respect to notifying the trusted contact person that a temporary hold has been placed, SIFMA suggested that FINRA adopt a voluntary reporting process that is separate from the process for placing a temporary hold under proposed Rule 2165. SIFMA's concerns are twofold: (1) potential difficulty in reaching a trusted contact person; and (2) a desire not to embarrass a customer by notifying a trusted contact person if the matter can be resolved through a discussion with the customer. Not all commenters agreed that the notification to the trusted contact person should be voluntary and some believed the requirement should be more stringent. For instance, Rich suggested a "more substantial" requirement than "attempting" to contact the trusted contact person.

Proposed Rule 2165 requires that the member notify the trusted contact person orally or in writing, which may be electronic, within two business days of placing a temporary hold. While FINRA appreciates the desire to ensure that a member actually discusses a hold with a trusted contact person, doing so may not be possible in every situation. As discussed above, FINRA would consider a member's mailing a letter, sending an email, or placing a telephone call and leaving a message with appropriate person(s) within the two-business-day period to constitute notification for purposes of proposed Rule 2165. Moreover, FINRA would consider the inability to contact a trusted contact person (e.g., an email is returned as undeliverable, a telephone number is out of service or a trusted contact person does not respond to a member's



notification attempts) to mean that the trusted contact person was not available for purposes of the Rule. With regard to SIFMA's concern over potentially embarrassing a customer by being required to notify a trusted contact person, FINRA notes that a member may attempt to resolve a matter with a customer before placing a temporary hold on a disbursement without having to notify a trusted contact person.<sup>71</sup> However, once a member places a hold on a disbursement, FINRA believes a member should notify a trusted contact person.

Rich further commented that a member should be required to notify both the customer and the trusted contact person when the member has a reasonable belief of financial exploitation. When placing a hold on a disbursement, proposed Rule 2165 would require a member to notify all persons authorized to transact business on an account, including the customer, as well as the trusted contact person, if available. Even where a member has not placed a temporary hold on an account, however, FINRA would expect a member to reach out to a customer as one step in addressing potential financial exploitation of the customer.

FSR requested that FINRA clarify that a member is not liable if it contacts a trusted contact person designated by a customer pursuant to Rule 4512 or proposed Rule 2165, so long as the customer has not directed the member to remove or replace the trusted contact person. FINRA would consider a member contacting the trusted contact person identified by a customer to be consistent with the proposed rule change, provided that the customer had not previously directed the member to remove or replace the trusted contact person.

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<sup>71</sup> As discussed above, FINRA's proposed amendments to Rule 4512 would permit a member to contact a trusted contact person to address, among other things, potential financial exploitation. In the context of SIFMA's concern, FINRA emphasizes that Rule 4512, as amended, would permit, but not require, a member to contact a trusted contact person about financial exploitation prior to placing a temporary hold on a disbursement. Thus, a member could resolve a matter with a customer prior to placing a hold on a disbursement without having to contact a trusted contact person.

Some commenters requested that FINRA clarify what would constitute reasonable efforts to obtain a name and contact information for a trusted contact person.<sup>72</sup> For purposes of the proposed rule change, FINRA would consider reasonable efforts to include actions such as incorporating a request for trusted contact person name and contact information on an account opening form or sending a letter, an electronic communication or other similar form of communication to existing customers requesting the name and contact information for a trusted contact person.

SIFMA requested that FINRA provide guidance on the appropriate place on new account forms for customers to designate a trusted contact person. Members may use their discretion in determining the appropriate place on new account forms for customers to designate a trusted contact person. Commonwealth supported the trusted contact person-related provisions and suggested that FINRA provide template language that members can use in account applications or other customer forms. If the SEC approves the proposed rule change, FINRA will make template language available for optional use by members in complying with the trusted contact person-related provisions of Rule 4512.<sup>73</sup>

SIFMA also requested that FINRA provide clarification as to whether the reasonable efforts requirement would apply to accounts opened after the proposed rule change becomes effective. The reasonable efforts requirement in Rule 4512 would apply to all accounts. FINRA would consider reasonable efforts for existing accounts to include asking the customer for the

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<sup>72</sup> See CAI, FSR, BDA, GWFS and SIFMA.

<sup>73</sup> In 2008, FINRA developed a New Account Application Template, available on FINRA's website that firms may use as a model form. See <http://www.finra.org/industry/new-account-application-template>. This New Account Application Template permits a customer to name a back-up contact who the member may contact. If the SEC approves the proposed rule change, FINRA will update the New Account Application Template to reflect the amendments to Rule 4512.

information when the member updates the information for the account either in the course of the member's routine and customary business or as otherwise required by applicable laws or rules.

FSR requested clarification on the role of the trusted contact person and the extent to which a member may rely on the information provided by the trusted contact person. BDA expressed concern that members could become responsible for evaluating the mental capabilities of trusted contact persons and that such capabilities could change over time. FINRA intends the trusted contact person to be a resource for a member in administering a customer's account and believes that a member may use its discretion in relying on any information provided by the trusted contact person. The proposed rule change does not make a member responsible for evaluating mental capabilities of trusted contact persons.

#### Requirement to Notify Trusted Contact Person of Designation

In the Notice 15-37 Proposal, FINRA stated that a member may elect to notify an individual that he or she was named as a trusted contact person; however, the proposal would not require notification. Some commenters supported requiring members to notify an individual that he or she was named as a trusted contact person.<sup>74</sup> Alzheimer's Assoc. supported also requiring a member to notify an individual designated as a trusted contact person if the customer later designates another individual to be his or her trusted contact person. FSR suggested that the trusted contact person should be required to acknowledge his or her role at the time of designation by the customer.

The proposed rule change does not require that a member notify a trusted contact person of his or her designation. FINRA believes that the administrative burdens of requiring notification would outweigh the benefits. However, a member may elect to notify a trusted

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<sup>74</sup> See IJEC, GSU and Alzheimer's Assoc.

contact person of his or her designation (e.g., if the member determines that notifying the trusted contact person may be helpful in administering a customer account).

#### Limitations on Who Can Be a Trusted Contact Person

Under the Notice 15-37 Proposal, the proposed amendments to Rule 4512 would have required that the trusted contact person be age 18 or older and not be authorized to transact business on behalf of the account. Commonwealth supported the age limitation but suggested that FINRA revise the proposed rule to explicitly permit members to rely on the representations of the customer regarding the trusted contact person's age so that members do not have to independently verify the age. While FINRA declines to revise the proposed rule as suggested, FINRA would not expect a member to verify the age of a designated trusted contact person.

SIFMA requested clarification of the meaning of the term "not authorized to transact business on the account." Some commenters did not support the limitation on persons not authorized to transact business on behalf of the account.<sup>75</sup> NAELA commented that the limitation would presumably prohibit persons with powers of attorney from serving as trusted contact persons. FSR and Lincoln supported permitting individuals with powers of attorney to be trusted contact persons. Lincoln further supported permitting trustees to be trusted contact persons.

In light of the concerns raised by commenters, FINRA has proposed removing the prohibition on those authorized to transact on the account so as to permit joint accountholders, trustees, individuals with powers of attorney and other natural persons authorized to transact business on an account to be designated as trusted contact persons.

#### Authorization to Contact the Trusted Contact Person

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<sup>75</sup> See Cowan and NAELA.

Under the Notice 15-37 Proposal, the proposed amendments to Rule 4512 would have required that, at the time of account opening, a member shall disclose in writing (which may be electronic) to the customer that the member or an associated person is authorized to contact the trusted contact person. In the Notice 15-37 Proposal, FINRA requested comment on whether Rule 4512 should require customer consent to contact the trusted contact person or if customer notice is sufficient.

Some commenters questioned whether customer notice would be sufficient under the Regulation S-P exception for disclosing information to a third party with unrevoked customer consent.<sup>76</sup> Lincoln suggested requiring customer consent to contact the trusted contact person. Commonwealth stated that customer notice should be sufficient and that requiring customer consent could jeopardize a member's ability to protect investors. FINRA believes that disclosures to a trusted contact person pursuant to proposed Rules 2165 or 4512(a)(1)(F) would be consistent with Regulation S-P.

SIFMA requested guidance on how the disclosure requirements in proposed Supplementary Material .06 to Rule 4512 could be met (e.g., in an account agreement, privacy policy or other form). The proposed rule change does not mandate any particular form of written disclosure. A member has flexibility in choosing which document should include the required disclosure (e.g., in an account application or another customer form) or whether to provide the disclosure in a separate document.

#### Information That May Be Disclosed to a Trusted Contact Person

Under the Notice 15-37 Proposal, pursuant to proposed Supplementary Material .06 to Rule 4512, a member may disclose to the trusted contact person information about the

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<sup>76</sup> See CAI, Lincoln and SIFMA.

customer's account to confirm the specifics of the customer's current contact information, health status, and the identity of any legal guardian, executor, trustee or holder of a power of attorney, and as otherwise permitted by proposed Rule 2165. In the Notice 15-37 Proposal, FINRA requested comment on whether the types of information that may be disclosed to the trusted contact person under Rule 4512 should be modified.

Some commenters supported addressing in Rule 4512 the information that may be shared by a member with a trusted contact person.<sup>77</sup> SIFMA further supported removing any restrictions on the information that may be discussed with a trusted contact person. IRI commented that members should have discretion to disclose to and discuss with the trusted contact person any information relevant to an investment under proposed Rule 2165. CAI supported a more general "catch all" category for information that may be disclosed to and discussed with a trusted contact person.

ICI suggested revising the proposed Supplementary Material to Rule 4512 to provide that a member is prohibited from contacting a trusted contact person except as permitted by Rule 2165 to protect the customer's privacy. GWFS commented that a member does not request or receive health information from customers and, if the member should have health information, it would be responsible for additional regulatory requirements.

FINRA has proposed retaining the approach in the Notice 15-37 Proposal regarding the types of information that may be disclosed to the trusted contact person under Rule 4512, with the addition of information to address possible financial exploitation. FINRA has sought to identify reasonable categories of information that may be discussed with a trusted contact person, including information that will assist a member in administering the customer's account. Given

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<sup>77</sup> See FSR, Lincoln, BDA and SIFMA.

privacy considerations, FINRA does not propose to give the member absolute latitude to discuss any information with trusted contact persons. With respect to health status, while members generally do not receive health information from customers, FINRA believes it is reasonable to permit members to reach out to the trusted contact person when they are concerned about a customer's health (e.g., when a customer who is known to be frail or ill has not responded to multiple telephone calls over a period of time). FINRA also believes that members should be allowed to contact the trusted contact person to address possible financial exploitation of the customer (e.g., when the member is concerned that the customer is being financially exploited but the member has not yet decided to place a temporary hold on a particular disbursement).

Some commenters suggested including in the list of information that may be disclosed to the trusted contact person the reason for any temporary hold, as well as details about the disbursement request.<sup>78</sup> Proposed Supplementary Material to Rule 4512 contemplates a member contacting the trusted contact person as otherwise permitted by Rule 2165. FINRA would consider discussing the temporary hold, including the rationale for the hold, with the trusted contact person to be covered by Supplementary Material to Rule 4512.

Two commenters stated that FINRA should explicitly permit members to share information concerning an account with the financial institution that is the receiving party in an ACATS transfer.<sup>79</sup> SIFMA also stated that such information sharing should be permitted even if a temporary hold is not placed on a disbursement pursuant to proposed Rule 2165. As noted above, FINRA would consider disbursements to include processing of an ACATS transfer but a member would need to have a reasonable belief of financial exploitation in order to place a

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<sup>78</sup> See Commonwealth and Alzheimer's Assoc.

<sup>79</sup> See FSR and SIFMA.

temporary hold on an ACATS transfer request pursuant to proposed Rule 2165. Furthermore, FINRA believes that the reasonableness of a member discussing a questionable ACATS transfer with the financial institution that is to receive the transferring assets would depend on the facts and circumstances. Members considering whether to discuss an ACATS transfer with another financial institution may wish to consider the availability of the Regulation S-P exception for allowing sharing of information in order to protect against or prevent actual or potential fraud, unauthorized transactions, claims, or other liability.<sup>80</sup> FINRA would consider providing guidance, as appropriate, if specific questions regarding the application of the proposed rule change to ACATS transfers arise.

#### Application of Rule 4512 Requirements to Existing Accounts

Consistent with the current requirements of Rule 4512, a member would not need to attempt to obtain the name of and contact information for a trusted contact person for existing accounts until such time as the member updates the information for the account either in the course of the member's routine and customary business or as otherwise required by applicable laws or rules.

Some commenters stated that members should be required to request the name and contact information for a trusted contact person for existing accounts not later than 12 months after the adoption of the proposed rule change.<sup>81</sup> NASAA supported requiring members to obtain the name and contact information for a trusted contact person from customers and to update the information on a regular basis in the manner in which members collect and maintain suitability information. CFA Institute supported requiring members to update trusted contact

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<sup>80</sup> See 17 C.F.R §§ 248.15(a)(2)(ii).

<sup>81</sup> See Cowan and Alzheimer's Assoc.



person-related information during periodic reviews and when a customer's situation changes. Commonwealth stated that members should be able to rely on existing procedures for updating accounts pursuant to Rule 17a-3 under the Exchange Act. Commonwealth further stated that it should be sufficient to indicate that no trusted contact person-related information has been provided to the member and that the customer should contact the member if he or she would like to provide the name of and contact information for a trusted contact person.

With respect to an account that was opened pursuant to a prior FINRA rule, FINRA Rule 4512(b) requires members to update the information for such an account in compliance with FINRA Rule 4512 whenever they update the account information in the course of their routine and customary business, or as required by other applicable laws or rules. With respect to any account that was opened pursuant to a prior FINRA rule, a member shall provide the required disclosure in writing, which may be electronic, when updating the information for the account pursuant to Rule 4512(b) either in the course of the member's routine and customary business or as otherwise required by applicable laws or rules. Such an approach promotes greater uniformity and consistency of account record information, while also minimizing burdens to members with respect to updating information for existing accounts. Applying the same standard to trusted contact person information would ensure that members use reasonable efforts to obtain such information for existing accounts in the course of their routine business, while not imposing undue burdens on firms to immediately contact all existing accountholders.

#### Immediate Family Member

Under the Notice 15-37 Proposal, if the trusted contact person is not available or the member reasonably believes that the trusted contact person has engaged, is engaged or will engage in the financial exploitation of the specified adult, the member would have been required

to contact an immediate family member, unless the member reasonably believes that the immediate family member has engaged, is engaged or will engage in the financial exploitation of the specified adult.

Some commenters raised privacy concerns regarding disclosing information to an immediate family member. GSU commented that an immediate family member who has not been designated as a customer's trusted contact person should be contacted only for the purpose of gathering information about the identity of a guardian, executor, trustee or holder of a power of attorney so as to ensure that the customer's personal and private information is not disclosed to persons that the customer does not wish to receive the information. ICI suggested that contacting an immediate family member or other person about an account without the customer's explicit approval would not be permitted by Regulation S-P. NASAA stated that contacting immediate family members implicates privacy concerns and may exacerbate the problems that the proposed rule change seeks to address. IRI supported giving a member discretion not to contact an immediate family member where the member may have reason to believe that the customer would not want the family member contacted. Some commenters suggested including "immediate family members" in the proposed Supplementary Material .06 to Rule 4512 to make it clear that such persons may be contacted under proposed Rule 2165.<sup>82</sup>

Some commenters expressed operational concerns with contacting an immediate family member. Alzheimer's Assoc. commented that it is unclear how a member would identify an immediate family member to contact in the event that the trusted contact person was unavailable. FSR suggested an alternative approach that where time is of the essence, a member may in its

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<sup>82</sup> See CAI and Wells Fargo.

discretion contact an immediate family member in instances where the trusted contact person is not immediately available.

Some commenters supported looking beyond immediate family members to provide members with discretion regarding whom to contact about a customer's account.<sup>83</sup> FSI suggested permitting members to also contact an individual who shares a trusted relationship with a customer (e.g., an attorney or an accountant).

Under the Notice 15-37 Proposal, the term "immediate family member" was defined to include a spouse, child, grandchild, parent, brother or sister, mother-in-law or father-in-law, brother-in-law or sister-in-law, and son-in-law or daughter-in-law, each of whom must be age 18 or older. SIFMA suggested revising the definition to include a customer's niece or nephew.

Due to the privacy and operational challenges noted by commenters, FINRA has proposed removing the requirements in the Notice 15-37 Proposal with respect to notifying an immediate family member when a temporary hold is placed. While a customer may name an immediate family member as his or her trusted contact person, the proposed rule change would not require that a member notify an immediate family member who is not authorized to transact business on the customer's account or who has not been named a trusted contact person. However, the proposed rule change would not preclude a member from contacting an immediate family member or any other person if the member has customer consent to do so. Moreover, contacting such persons may be useful to members in administering customer accounts.

#### Notification Period

Under the Notice 15-37 Proposal, proposed Rule 2165 would have required the member to provide notification of the hold and the reason for the hold to all parties authorized to transact

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<sup>83</sup> See Lincoln and Wells Fargo.

business on the account and, if available, the trusted contact person, no later than two business days after placing the hold. In the Notice 15-37 Proposal, FINRA requested comment on whether the two-business-day period for notifying the appropriate parties under proposed Rule 2165 is appropriate. If not, FINRA requested comment on what circumstances may warrant a shorter or longer period.

Commenters suggested extending the period from two business days to four business days,<sup>84</sup> five business days<sup>85</sup> and seven business days.<sup>86</sup> Commonwealth commented that the two-business-day period may be insufficient. Commonwealth suggested that if a member is unable to reach the trusted contact person or an immediate family member within two business days, then the member should have up to ten business days for notification. Alzheimer’s Assoc. suggested reducing the period from two business days to 24 hours.

Other commenters suggested not requiring notification within a specific time period. Wells Fargo suggested requiring notification “promptly” or “as is reasonable under the circumstances.” Because the two-business-day period may be insufficient, SIFMA suggested requiring “reasonable efforts” to notify the appropriate parties without imposing a specific time period.

Given the need for urgency in dealing with financial exploitation, FINRA has proposed retaining the requirement to notify all parties authorized to transact business on an account not later than two business days after the hold is placed. To ease members’ administrative and

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<sup>84</sup> See CAI.

<sup>85</sup> See FSR and FSI.

<sup>86</sup> See IRI.

operational burdens, FINRA has proposed eliminating the requirement to contact an immediate family member under proposed Rule 2165.

Commenters suggested clarifying when the time period would begin and end.<sup>87</sup> Many FINRA rules require calculating business days. For purposes of calculating the two-business-day period within which a member must provide notification of the temporary hold to parties authorized to transact business on the account, and consistent with the approach taken in FINRA Rule 9138(b) (Computation of Time), the day when the member places the temporary hold should not be included, so the two-business-day period would begin to run on the next business day and would thus run until the end of the second business day thereafter. For example, assuming no intermediate federal holiday, if a member placed a temporary hold on a Monday, the two-business-day period would run until the end of Wednesday. If a member placed a hold on a Friday, then the two-business-day period would run until the end of the following Tuesday, again assuming no intermediate federal holiday. FINRA intends this same approach to be used for the calculation of the period for the temporary hold under proposed Rule 2165.

#### Internal Review

Under the Notice 15-37 Proposal, if a member places a temporary hold, proposed Rule 2165 would require the member to immediately initiate an internal review of the facts and circumstances that caused the qualified person to reasonably believe that financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted.

PIRC supported requiring members to immediately initiate an internal review. SIFMA commented that the requirement to immediately initiate an internal review is unnecessarily duplicative because the proposed rule change already tacitly requires members to initiate an

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<sup>87</sup> See CAI and FSR.

internal review prior to placing the temporary hold. CAI suggested requiring members to initiate an internal review as soon as reasonably practicable. FINRA intends the requirement to immediately initiate an internal review to signify that a member should not delay in reviewing the appropriateness of the temporary hold and determining appropriate next steps. Moreover, because a member's internal review is part of determining appropriate next steps once a hold has been placed, FINRA does not believe that the requirement is unnecessarily duplicative of any other requirements in the proposed rule change.

FSR requested that FINRA clarify the scope of the internal review requirement, including what factors should be considered and the nature of the inquiry. FINRA believes that the appropriate internal review will depend on the facts and circumstances of the situation. Members have discretion in conducting a reasonable internal review under proposed Rule 2165.

#### Policies and Procedures

Proposed Rule 2165 would require a member that anticipates using a temporary hold in appropriate circumstances to establish and maintain written supervisory procedures reasonably designed to achieve compliance with the Rule, including, but not limited to, procedures on the identification, escalation and reporting of matters related to financial exploitation of specified adults. In the Notice 15-37 Proposal, FINRA requested comment on whether to mandate specific procedures for escalating matters related to financial exploitation.

Lincoln commented that FINRA should not prescribe or mandate any specific procedures for escalating matters. On the other hand, Miami Investor Rights Clinic supported requiring all members to establish written supervisory procedures for all registered persons related to the identification and escalation of matters involving financial exploitation.

FINRA has proposed retaining the approach in the Notice 15-37 Proposal requiring policies and procedures reasonably designed to achieve compliance with proposed Rule 2165. FINRA is committed to protecting seniors and other vulnerable adults and believes that the proposed rule change would assist members in addressing financial exploitation of such individuals. FINRA recognizes however that placing holds on disbursements, even on a temporary basis, could have negative implications for the customer's financial situation and the member-customer relationship. In light of the complexities surrounding financial exploitation and to help protect against potential misapplication of the proposed rule, FINRA believes that members must have written supervisory procedures reasonably designed to achieve compliance with proposed Rule 2165. Such procedures would help to ensure that members give careful consideration to their responsibilities in identifying and escalating matters related to financial exploitation of specified adults and that there is a consistent approach across the member's organization.

### Training

Under the Notice 15-37 Proposal, the proposal would also require members to develop and document training policies or programs reasonably designed to ensure that registered persons comply with the requirements of the Rule. Some commenters supported requiring broad training of the members' staffs regarding the risks of financial exploitation.<sup>88</sup> Miami Investor Rights Clinic supported requiring members to establish training policies and programs for all registered persons.

GSU suggested that FINRA oversee training policies or programs related to proposed Rule 2165, including the creation of continuing education requirements for registered persons

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<sup>88</sup> See NAELA and AARP.

and web-based training for all qualified persons. Commonwealth supported FINRA providing guidance on appropriate training of registered persons related to proposed Rule 2165, including FINRA-created training modules.

FINRA has proposed retaining the approach in the Notice 15-37 Proposal to require members to develop and document training policies or programs. FINRA has modified the requirement to mandate training for associated persons – not just registered persons. Because the proposed rule change permits an associated person of the member who serves in a supervisory, compliance or legal capacity for the member to place, terminate or extend a temporary hold on behalf of the member, FINRA believes that it is appropriate to require members to develop and document training policies or programs reasonably designed to ensure that associated persons – not just registered persons – comply with the proposed rule.

FINRA believes that the requirement will further strengthen compliance by members and associated persons that anticipate placing holds on disbursements of funds or securities consistent with the requirements of the Rule. The proposed rule change provides members with reasonable discretion in determining how best to structure such training policies or programs. FINRA has developed material for the Continuing Education Regulatory Element Program that addresses the financial exploitation of senior investors. FINRA will consider whether to develop additional continuing education content specifically addressing financial exploitation of seniors and providing additional guidance to members, as appropriate.

### Reporting



Some commenters supported revising the proposal to require members to report financial exploitation to local adult protective services and law enforcement.<sup>89</sup> Some commenters also supported revising the proposal to require members to report financial exploitation to FINRA.<sup>90</sup> SIFMA also supported providing members with explicit permission to share records with local adult protective services and law enforcement.

CAI commented that FINRA needs to provide a more definitive mechanism under which members may refer a matter to the proper agency or governmental body for handling. NAPSA supported requiring members to report financial exploitation to adult protective services under the Regulation S-P exceptions for allowing sharing of information in order to prevent actual or potential fraud and to comply with authorized civil investigations. FSR suggested that the proposed rule change should permit members to petition a government agency for a determination concerning a proposed disbursement, which would allow the applicable jurisdiction's adult protective services to intervene. FSI suggested that requiring the reporting of potential financial exploitation or exposing members to potential civil liability will lead to members reporting even the slightest suspicions to regulators, thereby over-taxing regulatory resources.

The proposed rule change does not require that members report a reasonable belief of financial exploitation to a state or local authority. Some states mandate such reporting by financial institutions, including broker-dealers. Given the varying and evolving reporting requirements under state law, FINRA believes that states are well positioned to determine whether a broker-dealer or any other entity has satisfied its reporting requirements under state

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<sup>89</sup> See NAELA, PIABA, Miami Investor Rights Clinic, NAIFA, PIRC, Alzheimer's Assoc., AARP, NASAA and SIFMA.

<sup>90</sup> See PIRC and NASAA.

law. FINRA would expect members to comply with all applicable state requirements, including reporting requirements.<sup>91</sup>

Alzheimer's Assoc. supported requiring members to document any referral to an external agency, as well as the final outcome of any holds placed. Because the proposed rule change would not require referring matters to an external agency, proposed Rule 2165 does not require members to document any such referrals. However, FINRA would expect members to comply with all applicable state recordkeeping requirements.

#### Costs

In the Notice 15-37 Proposal, FINRA requested comment on the costs that may result from the proposed rules. Commonwealth stated that it will need to make changes to existing account profile systems that will require development time, at an estimated cost of approximately \$40,000. Wells Fargo stated that it will need to incorporate the trusted contact person into the account opening process and make other necessary system updates, at an estimated cost of approximately \$1.25 million.

Other commenters indicated that the proposed rule change will result in costs to members but did not attempt to quantify such costs. GWFS commented that in order to capture, retain and periodically update trusted contact person information, systems changes will be required resulting in additional costs to the member. FSR suggested that the proposed recordkeeping requirement will result in significant costs for members.

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<sup>91</sup> See Interagency Guidance clarifying that reporting suspected financial abuse to appropriate local, state, or federal agencies does not, in general, violate the privacy provisions of the Gramm-Leach-Bliley Act or its implementing regulations, including Regulation S-P.

FSR suggested that FINRA's economic impact assessment present findings that show evidence that a customer designating a trusted contact person is, or is likely to be, an effective mitigant against the financial exploitation the proposed rule change is designed to address.

PIRC suggested that FINRA seek more information on the logistics and costs of expanding the proposed rule change to apply to all investors or to otherwise expand the definition of "specified adults."

As discussed in greater detail in Item 4 of this filing, FINRA does not believe that the proposed rule change will impose undue operational costs on members. While FINRA recognizes that there will be some operational costs to members in complying with the proposed trusted contact person requirement, FINRA has lessened the cost of compliance by not requiring members to notify the trusted contact person of his or her designation as such. Furthermore, the proposed rule change would permit a member to deliver the disclosure and notification required by Rule 4512 or Rule 2165 to trusted contact persons in paper or electronic form thereby giving the member alternative methods of complying with the requirements.

FIBA suggested that the reasonable costs associated with due diligence and investigatory processes, including responding to inquiries from the trusted contact person, immediate family members and other parties, should be borne by the customer and chargeable against the relevant account(s). FINRA would closely examine the reasonableness of a member charging a customer for costs associated with placing a temporary hold on the customer's account.

#### Additional Privacy Considerations

FIBA commented that the disclosure of confidential information pursuant to the proposed rule change may run afoul of U.S. and foreign privacy laws. The proposed rule change addresses Regulation S-P requirements. Members will need to separately consider any applicable non-U.S.

privacy requirements in determining whether to place temporary holds consistent with the requirements of proposed Rule 2165.

CAI questioned whether the Regulation S-P exception for disclosure of information pursuant to a law or rule would be available if proposed Rule 2165 permits, but does not require, a temporary hold. FINRA believes that a member disclosing information pursuant to proposed Rule 2165 would be consistent with the Regulation S-P exception for disclosures to comply with federal, state, or local laws, rules and other applicable legal requirements.

#### Additional Suggestions for Clarification or Guidance

CAI requested guidance on the status of funds during the time of the temporary hold and, in particular, on the obligations of different parties related to the temporary hold on disbursements of funds related to a variable annuity contract withdrawal or surrender, or how to address such funds when the member is not authorized to hold customer funds. Proposed Rule 2165 applies to disbursements of funds or securities out of a customer account and does not apply to redemptions of securities or other transactions. As such, FINRA does not anticipate a member that is not authorized to hold funds being required to hold funds under the proposed rule change. Rather, while the temporary hold on a disbursement is in effect, the funds or securities would remain in a customer's account and would not be released.

GWFS requested clarification as to the application of the proposed rule to members primarily involved with the retirement plan business, such as where a retirement plan sponsor's relationship is with a financial intermediary unaffiliated with the member but the member provides recordkeeping services. GWFS questioned which broker-dealer is "responsible for rule compliance."

More than one financial institution may be providing services in some arrangements and business models (e.g., retirement plans or introducing and clearing firm arrangements). In such arrangements, the financial institution that has a reasonable belief that financial exploitation is occurring may not hold the assets that are subject to the disbursement request. For example, with respect to introducing and clearing firm arrangements, an introducing firm may make the determination that placing a temporary hold pursuant to the proposed rule change is appropriate. The clearing firm may then place the temporary hold at the direction of and in reasonable reliance on the information provided by the introducing firm. FINRA recognizes that members making a determination or recommendation to place a hold on a disbursement may not be in the position to place the actual hold on the funds or securities.

#### Coordination with Other Regulators

As noted above, NASAA has separately proposed model legislation relating to financial exploitation of seniors and other vulnerable adults. NASAA stated that it hopes that the final outcomes of the FINRA proposal and the NASAA model are complementary. Some commenters recommended consistency between the FINRA proposal and NASAA model as being in the best interests of both investors and financial institutions.<sup>92</sup> Other commenters stated that FINRA should coordinate with NASAA and state regulators to develop a cohesive framework.<sup>93</sup>

While the proposed rule change and NASAA model are not identical, FINRA and NASAA have worked together to achieve consistency where possible and appropriate. Both the proposed rule change and NASAA model would apply to accounts of natural persons age 65 and

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<sup>92</sup> See ICI, Lincoln, AARP and FSI.

<sup>93</sup> See FSR, IRI, BDA and SIFMA.

older and would permit temporary holds of up to 25 business days, including the initial and subsequent periods. Proposed Rule 2165 also would incorporate the concept of a temporary hold being terminated or extended by a state regulator or agency or court of competent jurisdiction.

#### Implementation Period

Some commenters requested that if the proposed rule change is approved, FINRA allow at least 12 months for members to implement the requirements so as to provide adequate time to make updates to members' systems and written supervisory procedures.<sup>94</sup> If the proposed rule change is approved, FINRA will consider the need for members to make necessary changes to their systems, forms, and supervisory procedures in establishing an implementation date for the proposed rule change.

#### 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

(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:

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<sup>94</sup> See Commonwealth, CAI and Wells Fargo.

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](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2016-039 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-2016-039. 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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-

FINRA-2016-039 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.<sup>95</sup>

Brent J. Fields  
Secretary

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<sup>95</sup> 17 CFR 200.30-3(a)(12).