

## OMB APPROVAL

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Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * 199	SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 Form 19b-4	File No.* SR - 2021 - * 016 Amendment No. (req. for Amendments *)
Filing by Financial Industry Regulatory Authority Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934		
Initial * <input checked="" type="checkbox"/> Amendment * <input type="checkbox"/> Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input checked="" type="checkbox"/> Section 19(b)(3)(A) * <input type="checkbox"/> Section 19(b)(3)(B) * <input type="checkbox"/>	Rule <input type="checkbox"/> 19b-4(f)(1) <input type="checkbox"/> 19b-4(f)(4) <input type="checkbox"/> 19b-4(f)(2) <input type="checkbox"/> 19b-4(f)(5) <input type="checkbox"/> 19b-4(f)(3) <input type="checkbox"/> 19b-4(f)(6)
Pilot <input type="checkbox"/> Extension of Time Period for Commission Action * <input type="checkbox"/> Date Expires *		
Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010 Section 806(e)(1) * <input type="checkbox"/> Section 806(e)(2) * <input type="checkbox"/>		Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934 Section 3C(b)(2) * <input type="checkbox"/>
Exhibit 2 Sent As Paper Document <input type="checkbox"/>	Exhibit 3 Sent As Paper Document <input type="checkbox"/>	
<b>Description</b> Provide a brief description of the action (limit 250 characters, required when Initial is checked *). <div style="border: 1px solid black; padding: 5px; min-height: 40px;">           Proposed Rule Change to Amend Rule 2165 (Financial Exploitation of Specified Adults)         </div>		
<b>Contact Information</b> Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.		
First Name * Jeanette Last Name * Wingler Title * Associate General Counsel E-mail * jeanette.wingler@finra.org Telephone * (202) 728-8013 Fax (202) 728-8264		
<b>Signature</b> Pursuant to the requirements of the Securities Exchange Act of 1934, has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized. <div style="text-align: right;">(Title *)</div> <div style="display: flex; justify-content: space-between;"> <div>           Date 06/09/2021            By Patrice Gliniecki            (Name *)         </div> <div style="border: 1px solid black; padding: 5px; width: 60%;">           Senior Vice President and Deputy General Counsel  <div style="border: 1px solid black; padding: 2px; text-align: center; margin-top: 10px;">             Patrice Gliniecki,           </div> </div> </div>		
NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.		

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFF website.

**Form 19b-4 Information \***

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change \***

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies \***

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications**

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Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit Sent As Paper Document

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**Exhibit 3 - Form, Report, or Questionnaire**

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Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit Sent As Paper Document

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**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

**Partial Amendment**

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

**1. Text of the Proposed Rule Change**

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”),<sup>1</sup> the Financial Industry Regulatory Authority, Inc. (“FINRA”) is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed rule change to amend Rule 2165 (Financial Exploitation of Specified Adults) to permit member firms to: (1) extend a temporary hold on a disbursement of funds or securities or a transaction in securities for an additional 30-business days if the member firm has reported the matter to a state regulator or agency or a court of competent jurisdiction; and (2) place a temporary hold on a securities transactions where there is a reasonable belief of financial exploitation.

The text of the proposed rule change is attached as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

**2. Procedures of the Self-Regulatory Organization**

The FINRA Board of Governors authorized the filing of the proposed rule change with the SEC. No other action by FINRA is necessary for the filing of the proposed rule change.

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

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

3. **Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

(a) Purpose

Protection of Senior Investors

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

- Identifying senior investor issues as an examination priority;<sup>2</sup>
- Launching the dedicated FINRA Securities Helpline for Seniors<sup>®</sup>—available at 844-57-HELPS—to provide senior investors and their family members with a supportive place to get assistance from specially trained FINRA staff related to concerns they have with their brokerage accounts and investments;<sup>3</sup>
- Creating national standards that give member firms tools—including permitting firms to place temporary holds on disbursements when they have a reasonable belief of financial exploitation and requiring firms to request information from customers about a trusted contact—to address suspected financial exploitation of senior investors and other vulnerable adults (i.e., FINRA Rules 2165 and 4512 (Customer Account Information));<sup>4</sup>

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<sup>2</sup> See 2019 Risk Monitoring and Examination Priorities Letter (January 2019) available at <https://www.finra.org/industry/2019-annual-risk-monitoring-and-examination-priorities-letter>.

<sup>3</sup> See <http://www.finra.org/investors/highlights/finra-securities-helpline-seniors>.

<sup>4</sup> See Regulatory Notice 17-11 (March 2017).

- Collaborating with the North American Securities Administrators Association (NASAA) and the SEC to address senior investor protection, including issuing a Senior Safe Act Fact Sheet designed to raise awareness among member firms, investment advisers and transfer agents about the Act and its immunity provisions;<sup>5</sup>
- Issuing alerts and articles educating investors about important issues and highlighting risks facing senior investors;<sup>6</sup>
- Conducting and funding research on senior investors and financial fraud, and engaging with national, state and grassroots partners to develop and distribute fraud prevention resources, educate consumers, and provide training for law enforcement professionals, victim advocates, and other people on the front lines of fighting financial fraud;
- Issuing Regulatory Notices emphasizing member firms' obligations to senior investors and providing guidance on how to fulfill those obligations;<sup>7</sup> and

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<sup>5</sup> See [http://www.finra.org/sites/default/files/senior\\_safe\\_act\\_factsheet.pdf](http://www.finra.org/sites/default/files/senior_safe_act_factsheet.pdf).

<sup>6</sup> See, e.g., articles such as Protecting Seniors from Financial Exploitation; Investor Alerts such as Power of Attorney and Your Investments—10 Tips, Plan for Transition: What You Should Know About the Transfer of Brokerage Account Assets on Death; Seniors Beware: What You Should Know About Life Settlements; and FINRA's Retirement webpage for investors.

<sup>7</sup> See, e.g., Regulatory Notice 07-43 (Sept. 2007) (reminding member firms of their obligations relating to senior investors and highlighting industry practices to serve these customers); Regulatory Notice 09-42 (July 2009) (reminding member firms of their obligations with variable life settlement activities); Regulatory Notice 11-52 (Nov. 2011) (reminding member firms of their obligations regarding the supervision of associated persons using senior designations); Regulatory Notice 16-12 (Apr. 2016) (providing guidance on member firm responsibilities for sales of pension income stream products); and Regulatory Notice 17-11 (Mar. 2017) (discussing new senior rules and potential financial exploitation of seniors).

- Bringing disciplinary actions for misconduct against senior investors.<sup>8</sup>

#### Retrospective Review

In August 2019, FINRA launched a retrospective review to assess the effectiveness and efficiency of its rules and administrative processes that help protect senior investors from financial exploitation. The retrospective review process has two phases: the assessment phase and the action phase.<sup>9</sup> During the assessment phase, FINRA first sought comment in Regulatory Notice 19-27 (August 2019) on several questions with respect to addressing financial exploitation and other circumstances of financial vulnerability for senior investors. FINRA received 22 comment letters to Regulatory Notice 19-27.<sup>10</sup>

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

<sup>9</sup> The stakeholders who provided input during the assessment phase of the retrospective review are collectively referred to herein as the “Retrospective Review Stakeholders.”

<sup>10</sup> See Letter from Megan Valent, Legal Intern, and Teresa J. Verges, Director, University of Miami School of Law, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 1, 2019; Letter from Jennifer L. Szaro, Lara May & Associates, LLC, and Robert L. Hamman, President, First Asset Financial Inc., to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 4, 2019; Letter from William A. Jacobson, Esq., Clinical Professor of Law and Director, Securities Law Clinic Cornell Law School, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 7, 2019; Letter from Kathleen Quinn, Board President, National Adult Protective Services Association, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 7, 2019; Letter from Joe Snyder, Chair, Philadelphia Financial Exploitation Task Force dated Oct. 7, 2019; Letter from Seth A. Miller, General Counsel, Executive Vice President, and Chief Risk Officer, Cambridge Investment Research, Inc., to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Eric Arnold, Clifford Kirsch and Holly Smith of Eversheds Sutherland on behalf of the Committee of Annuity Insurers, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Christopher W.

In addition, FINRA obtained input from several advisory committees comprising member firms of different sizes and business models, investor protection advocates, member firms, and trade associations. FINRA also obtained the perspective of its operating departments that touch the rules and their administration. Moreover, FINRA considered examination observations and findings involving senior issues. In this regard,

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

FINRA previously had identified as an examination priority reviewing member firms' controls regarding Rule 2165, to the extent firms anticipated using the rule's safe harbor, and Rule 4512's trusted-contact provision.<sup>11</sup> As part of these reviews, FINRA looked at whether member firms had clearly defined policies and procedures and sought information about firms' early experiences with these provisions.<sup>12</sup>

Finally, FINRA developed an anonymous survey that was distributed to all member firms in the first quarter of 2020. The purpose of the survey was to collect information in order to validate the feedback received and to provide an additional opportunity for all member firms to provide their views.<sup>13</sup>

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

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<sup>11</sup> See 2019 Annual Risk Monitoring and Examination Priorities Letter (Jan. 22, 2019).

<sup>12</sup> See id.

<sup>13</sup> Survey respondents were permitted to skip survey questions. Information in this proposed rule change regarding the percentage of survey respondents for a particular question reflects the percentage of respondents for that question, not the percentage of respondents for the survey as a whole. Approximately 190 responses were received for each top-level (non-nested) question. Therefore, unless indicated otherwise, the reader can assume that the percentages are based on approximately 190 responses.

adults; and (3) providing guidance to aid member firms and senior investors and other specified adults.<sup>14</sup>

### Rule 2165

Rule 2165 is the first uniform national standard for placing temporary holds on disbursements to address suspected financial exploitation.<sup>15</sup> Rule 2165 permits a member firm to place a temporary hold on a disbursement of funds or securities from the account of a “specified adult”<sup>16</sup> customer when the firm reasonably believes that financial exploitation of that adult has occurred, is occurring, has been attempted or will be attempted. Prior to the adoption of Rule 2165, some member firms expressed concern that placing a temporary hold on suspicious disbursements was not explicitly permitted by FINRA rules.

To address these concerns, Rule 2165 provides member firms and their associated persons with a safe harbor from FINRA Rules 2010 (Standards of Commercial Honor and Principles of Trade), 2150 (Improper Use of Customers’ Securities or Funds;

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<sup>14</sup> The proposed amendments to Rule 2165 set forth in Regulatory Notice 20-34 are referred to herein as the “Notice 20-34 Proposal.”

<sup>15</sup> See Securities Exchange Act Release No. 79964 (Feb. 3, 2017), 82 FR 10059 (Feb. 9, 2017) (Notice of Filing of Partial Amendment No. 1 and Order Granting Accelerated Approval of File No. SR-FINRA-2016-039).

<sup>16</sup> The definition of “specified adult” in Rule 2165 covers those investors who are particularly susceptible to financial exploitation. A “specified adult” is (A) a natural person age 65 and older or (B) a natural person age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests. See Rule 2165(a)(1). Supplementary Material .03 to Rule 2165 provides that a member firm’s reasonable belief that a natural person age 18 and older has a mental or physical impairment that renders the individual unable to protect his or her own interests may be based on the facts and circumstances observed in the member firm’s business relationship with the person.

Prohibition Against Guarantees and Sharing in Accounts) and 11870 (Customer Account Transfer Contracts) when member firms exercise discretion in placing temporary holds on disbursements of funds or securities from the accounts of specified adults consistent with the requirements of Rule 2165. FINRA encourages member firms to take advantage of the Rule 2165 safe harbor where there is a reasonable belief of customer financial exploitation.

#### Rule Safeguards

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

- (1) A member firm provide notification of the hold and the reason for the hold to all parties authorized to transact business on the account, including the customer and the customer's trusted contact person no later than two business days after the date that the member firm first placed the hold;<sup>17</sup>
- (2) A member firm that places a hold pursuant to the rule immediately initiate an internal review of the facts and circumstances that caused the member to reasonably believe that the financial exploitation of the specified adult has occurred, is occurring, has been attempted, or will be attempted;<sup>18</sup>
- (3) In addition to the general supervisory and recordkeeping requirements of FINRA Rules 3110, 3120, 3130, 3150, and Rule 4510 Series, a member relying on the rule establish and maintain written supervisory procedures reasonably designed to achieve compliance with the rule, including, but

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<sup>17</sup> See Rule 2165(b)(1)(B).

<sup>18</sup> See Rule 2165(b)(1)(C).

not limited to, procedures related to the identification, escalation and reporting of matters related to the financial exploitation of specified adults;<sup>19</sup>

- (4) Any request for a hold be escalated to a supervisor, compliance department or legal department rather than allowing an associated person handling an account to independently place a hold;<sup>20</sup>
- (5) A member firm relying on the rule develop and document training policies or programs reasonably designed to ensure that associated persons comply with the requirements of the rule;<sup>21</sup> and
- (6) A member firm relying on the rule retain records related to compliance with the rule, which shall be readily available to FINRA, upon request.<sup>22</sup>

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

#### Responding to Suspected Financial Exploitation

Temporary holds on disbursements have played a critical role in providing member firms a way to quickly respond to suspicions of financial exploitation before potentially ruinous losses occur for the customer. For example, FINRA's report for the

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<sup>19</sup> See Rule 2165(c)(1).

<sup>20</sup> See Rule 2165(c)(2).

<sup>21</sup> See Supplementary Material .02 to Rule 2165.

<sup>22</sup> See Rule 2165(d).

five-year anniversary of the FINRA Securities Helpline for Seniors<sup>®</sup> highlights several matters that illustrate the positive impact of placing temporary holds on disbursements to address financial exploitation.<sup>23</sup> The matters include temporary holds placed by member firms to prevent senior investors from losing:

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

#### Proposed Amendments to Rule 2165

The retrospective review indicated that Rule 2165 has been an effective tool in the fight against financial exploitation,<sup>24</sup> but supported amendments to permit member firms to: (1) extend a temporary hold on a disbursement of funds or securities or a transaction in securities for an additional 30-business days if the member firm has reported the matter to a state regulator or agency or a court of competent jurisdiction; and (2) place a

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<sup>23</sup> See Protecting Senior Investors 2015–2020: An Update on the FINRA Securities Helpline for Seniors, Other FINRA Initiatives and Member Firm Practices (Apr. 2020) (Senior Helpline Anniversary Report).

<sup>24</sup> During exams in 2019 focusing on Rule 2165, FINRA observed that large firms were more likely than small firms to place temporary holds pursuant to Rule 2165. Some member firms that declined to use the safe harbor cited litigation risks associated with placing temporary holds or in evaluating whether a customer is being financially exploited. This is consistent with FINRA's survey responses with large firms indicating that they had placed a temporary hold pursuant to the rule in a significantly larger percentage than mid-size or small firms. Thirty-one survey respondents had placed a temporary hold pursuant to Rule 2165. Eighty-four percent of large firm respondents had placed a hold pursuant to Rule 2165, while only 6% of all other sized firm respondents had placed a hold pursuant to Rule 2165.

temporary hold on a securities transaction where there is a reasonable belief of financial exploitation.

#### Hold Period

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

Retrospective Review Stakeholders and commenters to the Notice 20-34 Proposal generally supported extending the current 25-business day hold period to provide member firms with a longer period to resolve matters.<sup>27</sup> These Retrospective Review Stakeholders and commenters to the Notice 20-34 Proposal indicated that the current

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

<sup>26</sup> See Rule 2165(b)(3).

<sup>27</sup> See, e.g., comments to the Notice 20-34 Proposal from CAI, Cambridge, Commonwealth, Edward Jones, Fidelity, FSI, IRI, Miami Investor Rights Clinic, MMLIS, NAPSA, Norcross, Philadelphia Financial Exploitation Task Force, SIFMA and Wells Fargo.

period may not be sufficient when a matter is under consideration by a state regulator, state agency or court. Notably, this view was shared by NAPSA and the Philadelphia Financial Exploitation Task Force in comments to Regulatory Notice 19-27 and the Notice 20-34 Proposal, with both commenters stating that adult protective services (APS) agencies, state regulators and law enforcement typically need more time to conduct thorough investigations. In contrast, in comments to Regulatory Notice 19-27 and the Notice 20-34 Proposal, NASAA supported retaining the current 25-business day period, which aligns with the hold period provided in the NASAA Model Act to Protect Vulnerable Adults from Financial Exploitation (NASAA Model Act).<sup>28</sup>

During exams in 2019 focusing on Rule 2165, member firms expressed to FINRA the need for additional time to conduct investigations and resolve matters.<sup>29</sup> Member firms were asked in the survey distributed to member firms about possible impediments to resolving a matter within the current 25-business day hold period provided by Rule 2165. Approximately 53% of survey respondents stated that they had been unable to resolve a matter within the 25-business day period. The most common reason was that the matter was under consideration by a state agency (such as APS) or a court. Other

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<sup>28</sup> The NASAA Model Act is available at <https://www.nasaa.org/industry-resources/senior-issues/model-act-to-protect-vulnerable-adults-from-financial-exploitation/>.

<sup>29</sup> In 2019, FINRA identified as an examination priority: (1) reviewing member firms' controls regarding their obligations under trusted contact person-related amendments to FINRA Rule 4512 and Rule 2165, to the extent that firms anticipate placing temporary holds on disbursements pursuant to the Rule 2165 safe harbor, including whether firms have clearly defined policies and procedures or practices; and (2) learning about firms' early experiences with these provisions. See 2019 Annual Risk Monitoring and Examination Priorities Letter (Jan. 22, 2019).

common reasons included: (1) the customer did not respond to inquiries from the firm; or (2) the customer did not believe that he or she was being financially exploited. For matters that took longer to resolve than the 25-business day period, approximately 35% of survey respondents indicated that it took on average 26-50 days to resolve the matter and approximately 59% of survey respondents indicated that it took on average 51-100 days to resolve the matter.

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

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

In addition, Rule 2165(d) requires members to retain records related to compliance with the rule, which shall be readily available to FINRA, upon request. To

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

evidence compliance with Rule 2165 in placing or extending a temporary hold, FINRA is proposing to require that a member firm retain records of the reason and support for any extension of a temporary hold, including information regarding any communications with or by a state regulator or agency of competent jurisdiction or a court of competent jurisdiction.<sup>31</sup>

#### Transactions in Securities

While placing a hold pursuant to Rule 2165 stops funds or securities from leaving a customer's account, the rule currently does not apply to transactions in securities.<sup>32</sup> Retrospective Review Stakeholders and commenters to the Notice 20-34 Proposal generally supported extending Rule 2165 to permit a member firm to place a temporary hold on a transaction in securities when the firm has a reasonable belief that the customer is being financially exploited.<sup>33</sup> Even if a temporary hold is placed on a disbursement out of the customer's account, these Retrospective Review Stakeholders and commenters to the Notice 20-34 Proposal noted that executing a related transaction may result in significant financial consequences for the customer (e.g., adverse tax consequences, surrender charges, the inability to regain access to a sold investment that has been closed

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<sup>31</sup> See proposed Rule 2165(d)(6).

<sup>32</sup> For example, Rule 2165 currently would not apply to a customer's order to sell his shares of a stock. However, if a customer requested that the proceeds of a sale of shares of a stock be disbursed out of his account at the member firm, then the rule could apply to the disbursement of the proceeds where the customer is a "specified adult" and there is reasonable belief of financial exploitation.

<sup>33</sup> See, e.g., comments to the Notice 20-34 Proposal from CAI, Cambridge, Commonwealth, Edward Jones, Fidelity, FSI, IRI, LPL, Miami Investor Rights Clinic, MMLIS, NAPSA, Norcross, Philadelphia Financial Exploitation Task Force, SIFMA and Wells Fargo.

to new investors or trading by a perpetrator in inappropriate high risk or illiquid securities).

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

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

FINRA recognizes that placing a temporary hold on a transaction is a serious step for a member firm and the affected customer. But FINRA also recognizes that placing a temporary hold on the underlying transaction may prevent significant negative financial consequences for the customer. These negative financial consequences can result even if a temporary hold is placed on any related disbursement of funds out of the customer's

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<sup>34</sup> As of June 2021, the following states permit holds on disbursement and transactions: Arkansas, Arizona, California, Florida, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Dakota, Oklahoma, South Carolina, Texas, Utah, Virginia, Washington and West Virginia.

account. Moreover, as discussed above, the rule includes important safeguards designed to avoid misapplication of the rule.

#### Need for the Proposed Amendments

Retrospective Review Stakeholders and commenters to the Notice 20-34 Proposal consistently indicated the prevalence of and problems associated with financial exploitation of senior investors,<sup>35</sup> including the potential for significant and longstanding harm to customers.<sup>36</sup> Moreover, Retrospective Review Stakeholders and commenters to the Notice 20-34 Proposal generally agree that member firms need tools to address suspected financial exploitation.<sup>37</sup>

As discussed in greater detail in Item 5 infra, some Retrospective Review Stakeholders and commenters to the Notice 20-34 Proposal expressed concern that a temporary hold could be harmful to customers or that Rule 2165 could be misused by member firms. Regarding the potential of customer harm, it is important to consider that

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<sup>35</sup> See, e.g., comments to the Notice 20-34 Proposal from PIABA. See also Consumer Financial Protection Bureau, Office of Financial Protection for Older Americans, Suspicious Activity Reports on Elder Financial Exploitation: Issues and Trends (Feb. 2019) (highlighting that SAR filings on elder financial exploitation quadrupled from 2013 to 2017). See also U.S. Securities and Exchange Commission, Office of the Investor Advocate, Elder Financial Exploitation (June 2018) (providing an overview of studies on the prevalence of senior financial exploitation).

<sup>36</sup> See, e.g., discussion in the Senior Helpline Anniversary Report regarding a member firm placing a temporary hold to prevent a senior investor from losing \$200,000 (representing approximately two-thirds of the investor's account) related to a CIA lawsuit scam.

<sup>37</sup> See, e.g., in comments to the Notice 20-34 Proposal the Miami Investor Rights Clinic stated that it "fully supports" the proposed amendments as they will provide greater protection to seniors and vulnerable adults that may be victims of financial exploitation. IRI also stated that the proposed amendments will better enable firms to prevent the financial exploitation of vulnerable Americans.

Rule 2165 is available only if the member firm has a reasonable belief that the customer is being financially exploited. Moreover, the temporary hold may be placed only on the suspicious disbursement (or transaction if the proposed amendment to extend the rule to transactions is approved). Even if the member firm has placed a temporary hold on a suspicious disbursement or transaction pursuant to Rule 2165, a temporary hold may not be placed on non-suspicious disbursements or transactions (e.g., a regular mortgage payment).

In evaluating concerns about potential misuse of Rule 2165, neither FINRA nor commenters were able to identify any reported customer complaints on Forms U4 or U5 or pursuant to Rule 4530 related to placing a temporary hold pursuant to Rule 2165. Moreover, respondents to FINRA's survey to member firms indicated that they had not reported a complaint on Form U4 or Form U5 or pursuant to Rule 4530 related to placing any temporary holds. In addition, neither FINRA nor the states have brought any disciplinary action due to misuse of Rule 2165 or any state temporary hold law.<sup>38</sup>

The demonstrated and potential benefits of Rule 2165 weigh in favor of the proposed rule change. Notably, Rule 2165 has been used by member firms to address suspected financial exploitation and these temporary holds have prevented significant financial harm to customers.<sup>39</sup> Moreover, Retrospective Review Stakeholders and commenters to the Notice 20-34 Proposal stressed that, even if a temporary hold is placed

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<sup>38</sup> This lack of disciplinary action by FINRA and the states is also noted in the NASAA's comment letter to the Notice 20-34 Proposal.

<sup>39</sup> See, e.g., Protecting Senior Investors 2015–2020: An Update on the FINRA Securities Helpline for Seniors, Other FINRA Initiatives and Member Firm Practices (Apr. 2020).

on a disbursement of funds or securities, a customer can experience significant negative financial consequences if a suspicious transaction is permitted.<sup>40</sup>

Some Retrospective Review Stakeholders and commenters to the Notice 20-34 Proposal believe that the proposed extension of the hold period is too long and could be harmful to customers.<sup>41</sup> Commenters to the Notice 20-34 Proposal stated that some matters can be quickly resolved after placing a temporary hold, but complex matters that involve investigations by state regulators or agencies or legal actions in a court (e.g., financial exploitation of an elderly customer by a family member or caregiver) may need additional time to resolve.<sup>42</sup> In considering the appropriate time period, it is notable that NAPSA and the Philadelphia Financial Exploitation Task Force—representing APS programs which play a critical role in investigating suspicions of financial exploitation—also expressed in their comments to the Notice 20-34 Proposal the need for additional time to conduct investigations. NAPSA’s comment letter to the Notice 20-34 Proposal also shared data in support of the need for a longer hold period in Rule 2165 that the average investigation duration of reported matters to the federal National Adult Maltreatment Reporting System (NAMRS) is 52.6 days.

In considering the proposed extension of Rule 2165 to securities transactions, it is notable that approximately 50% of the U.S. population lives in a state that permits

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<sup>40</sup> See, e.g., comments to the Notice 20-34 Proposal from Edward Jones and the Miami Investor Rights Clinic.

<sup>41</sup> See, e.g., comments to the Notice 20-34 Proposal from NASAA and the Pittsburgh Clinic.

<sup>42</sup> See, e.g., comments to the Notice 20-34 Proposal from Edward Jones.

broker-dealers and investment advisers to place holds on suspicious securities transactions pursuant to state law.

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

As noted in Item 2 of this filing, if the Commission approves the proposed rule change, FINRA will announce the implementation date of the proposed rule change in a Regulatory Notice. The implementation date will be no later than 180 days following publication of the Regulatory Notice announcing Commission approval.

(b) Statutory Basis

The proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>43</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 allowing for additional time for firms to resolve matters and for APS agencies, state regulators and law enforcement to conduct thorough investigations of suspected financial exploitation. Customers would benefit from this extension in instances where the additional time allows for a positive identification of financial exploitation and retention of the disbursement amount within

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

the account. The proposed rule change also will allow firms to place temporary holds on transactions, which should prevent harm to exploited customers such as being subject to adverse tax consequences, early withdraw penalties or investments that do not align with their investor profiles. Moreover, the rule incorporates numerous safeguards that apply to each temporary hold and that are designed to ensure that there is not a misapplication of the rule.

**4. Self-Regulatory Organization's Statement on Burden on Competition**

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

Economic Impact Assessment

FINRA has undertaken an economic impact assessment, as set forth below, to further analyze the regulatory need for the proposed rule change, its potential economic impacts, including anticipated costs, benefits, and distributional and competitive effects, relative to the current baseline, and the alternatives FINRA considered in assessing how best to meet its regulatory objective.

Regulatory Need

FINRA is active in its efforts to protect senior investors from financial exploitation. In the context of these efforts, and with evidence of a growing trend of such exploitation<sup>44</sup>, FINRA conducted a review of relevant existing rules and administrative processes that help protect senior investors from financial exploitation. Through this review, FINRA has received feedback on the effectiveness and efficiency of Rule 2165.

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<sup>44</sup> See supra note 35.

### Economic Baseline

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

FINRA also distributed a survey to all member firms in the first quarter of 2020, to which a subset of firms, ranging from small to large firms, responded. The purpose of the survey was to collect information and to provide member firms an additional opportunity to provide their views. The economic baseline, regarding the current application of the rule by firms and the effectiveness and efficiency of the rule, is established using the information obtained during the assessment phase.

As noted above, with respect to the use of Rule 2165 in placing a temporary hold on disbursements, of the member firms that indicated having placed a temporary hold,<sup>45</sup>

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<sup>45</sup> Thirty-one firms responded in the survey that they had placed a temporary hold. Out of the 31 firms that indicated that they had placed a temporary hold, 17 firms indicated that it took more than the 25-business day period to resolve the matter, as currently provided in Rule 2165.

approximately 53% of survey respondents stated that the firm had been unable to resolve the matter within the 25-business day period provided by the rule. For firms responding that any matter took longer to resolve than the 25-business day period, approximately 35% indicated that it took on average 26-50 days to resolve the matter and approximately 59% indicated that it took on average 51-100 days to resolve the matter.

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

#### Economic Impacts

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

The proposed amendments to Rule 2165 would permit extending a temporary hold for an additional 30-business days if the member firm has reported the matter to a state agency or a court of competent jurisdiction. FINRA believes that allowing an extension to the temporary hold period would provide firms additional time to resolve matters and for APS agencies, state regulators and law enforcement to conduct thorough investigations of suspected financial exploitation. Moreover, extensions may allow for greater collaboration and interaction between the member firm placing the hold and other authorities or regulators, on a local, state or national level. Customers would benefit from this extension in instances where the additional time allows for a positive

identification of financial exploitation and retention of the disbursement amount within the account. Alternatively, if the additional time leads to a determination that no financial exploitation occurred, customers may incur costs from the extended delay in access to the funds.

The proposed amendments would also extend Rule 2165 to permit a member firm to place a temporary hold on a transaction in securities when the firm has a reasonable belief that the customer is being financially exploited. Twenty states, together containing approximately half of the U.S. population, already permit firms to place temporary holds on transactions. The proposed amendments would impact firms in all states by providing a safe harbor under FINRA rules for firms to place holds on transactions. The extent of the impact would vary across firms depending on their decision to take advantage of the proposed extension of Rule 2165 to transactions.<sup>46</sup> The proposed amendments would also impact the customers of those firms. In instances when a firm's hold on a transaction prevented financial exploitation, the customer whose transaction was held would benefit from not incurring the negative financial consequences of the transaction. In instances when a transaction hold was executed and no financial exploitation was found, the economic impact of the hold stems primarily from the magnitude of the security's price movement (positive or negative) between the time the hold was placed and the time it was lifted.

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<sup>46</sup> When asked in the survey about FINRA extending Rule 2165 to transactions, respondents were evenly split with 50% anticipating that the member firm would place holds on transactions pursuant to amended Rule 2165 and 50% anticipating that the firm would not place holds.

### Alternatives Considered

FINRA considered various alternatives to the proposed rule amendments. First, FINRA considered different possible extensions of the temporary hold period, ranging from no extension to an extension of up to 75-business days. On the one hand, a longer temporary hold period would allow member firms more time to investigate and contact the relevant parties, as well as obtain input from a state regulator, agency, or court if needed. Alternatively, an extended temporary hold period could result in increased costs to both investors and firms.<sup>47</sup> These include increased costs to investors from lost investment opportunities or liquidity problems and increased costs to firms from legal challenges to investigations, all of which are anticipated to be related to the length of the hold on disbursements. Considering these factors, as well as information from the various outreach efforts and stakeholder engagements, FINRA believes that the proposal strikes a balance across the spectrum of possible options.

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

Third, FINRA considered requiring firms to place temporary holds, for either disbursements or transactions, rather than permitting it. FINRA believes that providing

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<sup>47</sup> See discussion in “Economic Impacts” section above in Item 4, “Hold Period” section below in Item 5, and Regulatory Notice 20-34.

firms with the discretion of placing a hold, versus a requirement, results in incentives to use the hold option in a way that ultimately benefits both the firm and its' customers.<sup>48</sup>

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

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

The proposed rule change was published for comment in Regulatory Notice 20-34. FINRA received 19 comment letters in response to the Notice 20-34 Proposal. A copy of the Notice 20-34 Proposal is attached as Exhibit 2a. Copies of the comment letters received in response to the Notice 20-34 Proposal are attached as Exhibit 2c.<sup>49</sup>

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

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<sup>48</sup> See Bruce I. Carlin, Tarik Umar, and Hanyi Yi, Deputization, National Bureau of Economic Research Working Paper No. 27225 (May 2020) (discussing the benefits of providing financial institutions tools to address suspected financial exploitation versus requiring specific actions).

<sup>49</sup> See Exhibit 2b for a list of abbreviations assigned to commenters.

Support for the Notice 20-34 Proposal

Fourteen commenters expressed support for the Notice 20-34 Proposal.<sup>50</sup> Several commenters stated that the proposed amendments will better protect vulnerable investors from financial exploitation. For example, Miami Investor Rights Clinic stated that it “fully supports” the proposed amendments as they will provide greater protection to seniors and vulnerable adults that may be victims of financial exploitation. IRI also stated that the proposed amendments will better enable firms to prevent the financial exploitation of vulnerable Americans.

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

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<sup>50</sup> See CAI, Cambridge, Commonwealth, Edward Jones, Fidelity, FSI, IRI, Miami Investor Rights Clinic, MMLIS, NAPSA, Norcross, Philadelphia Financial Exploitation Task Force, SIFMA and Wells Fargo.

Opposition to or Concerns with the Notice 20-34 Proposal

PIABA supports enhanced protections for investors but expressed concern that member firms could misuse the proposed amendments. PIABA recommended that FINRA require in Rule 2165 that the member firm: (1) update its written supervisory manuals to include training and review transactions suspected of elder abuse; (2) include in its retained records documentation of the firm's reasonable efforts to quickly investigate the matter; and (3) file a report with the appropriate APS agency and state regulator as soon as reasonably practical but no later than seven business days from the initial hold period.

Regarding PIABA's suggested requirements, Rule 2165 currently includes several safeguards designed to prevent misapplication of the rule, including requiring that member firms that intend to place a hold pursuant to Rule 2165 must: (1) retain records related to the firm's internal investigation;<sup>51</sup> and (2) develop and document training policies or programs reasonably designed to ensure that associated persons comply with the requirements of the rule.<sup>52</sup> FINRA also expects member firms to comply with all applicable state requirements, including reporting requirements.

NASAA's letter acknowledges that neither FINRA nor the states have brought disciplinary action due to misuse of Rule 2165 or any state temporary hold laws by a member firm. However, as discussed in greater detail below, NASAA does not support extending the temporary hold period and expressed concern about the potential impact of

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<sup>51</sup> See Rule 2165(d).

<sup>52</sup> See Supplementary Material .02 to Rule 2165.

a longer hold period on customers. FINRA's responses to NASAA's detailed concerns are included below in Item 5 under "Hold Period" and "Transactions in Securities."

Pittsburgh Clinic does not support current Rule 2165 or the proposed amendments because it believes that member firms could misuse temporary holds for their financial benefit. FINRA has extensively addressed the concerns of potential misuse above in Item 3 under the "Need for the Proposed Amendments."

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

FINRA engaged in extensive internal and external stakeholder outreach during the assessment phase of the retrospective review to assess the effectiveness and efficiency of FINRA's rules and administrative processes that help protect senior investors from financial exploitation. This outreach included: (1) seeking comment in Regulatory Notice 19-27 on several questions with respect to addressing financial exploitation and other circumstances of financial vulnerability for senior investors; (2) obtaining input from several advisory committees comprising member firms of different sizes and business models, investor protection advocates, member firms, and trade associations; (3) obtaining the perspective of FINRA's operating departments that administer the rules and their administration; (4) considering FINRA examination observations and findings

involving senior issues; and (5) developing an anonymous survey that was distributed to all member firms in the first quarter of 2020. In addition, as part of the action phase of the retrospective review, FINRA sought comment on the proposed amendments to Rule 2165 in Regulatory Notice 20-34. FINRA considered the collective feedback from the Retrospective Review Stakeholders and comments to the Notice 20-34 Proposal in assessing Rule 2165 and the proposed amendments.

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

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

### Hold Period

The majority of commenters supported the proposed amendment to extend a temporary hold for an additional 30 business days if the member firm has reported the matter to a state regulator or agency or a court of competent jurisdiction.<sup>53</sup> For example, Edward Jones stated that the firm is often able to quickly resolve matters where it suspects financial exploitation of a senior or vulnerable investor by engaging the customer's trusted contact person or using other tools, but the firm has experienced situations where the current 25-day period provided under Rule 2165 is insufficient. Edward Jones notes having experienced this situation when working with state agencies, such as APS, to investigate a case of suspected financial exploitation. Edward Jones stated that some APS agencies are not adequately resourced to quickly review these matters and yet are hesitant to request an extension of a hold until they determine whether exploitation exists.

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

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<sup>53</sup> See CAI, Cambridge, Commonwealth, Edward Jones, Fidelity, FSI, IRI, Miami Investor Rights Clinic, MMLIS, NAPSA, Norcross, Philadelphia Financial Exploitation Task Force, SIFMA and Wells Fargo.

Exploitation Task Force expressed appreciation for the additional days as a starting point, with the ability to revisit as more data becomes available.

While acknowledging that an adequate period for review of the facts and circumstances must be allowed, Pittsburgh Clinic stated that the proposed longer hold period increases the possibility that a member firm could misuse a hold to harm an investor. Pittsburgh Clinic stated that the proposed hold period is too long because customers may need the funds to pay for living expenses. Pittsburgh Clinic also expressed concern that Rule 2165 does not include a reporting requirement unless a member firm wants to avail itself of the additional 30-business day extension.

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

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

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

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

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

Commonwealth supported the proposed extension of the temporary hold period and stated that there should be some additional remedy when a matter is not resolved at the end of the hold period. As previously addressed in the rule filing to adopt Rule 2165, if a member firm is unable to resolve an issue due to circumstances beyond its control, there may be circumstances in which a member firm may extend a temporary hold after the period provided under the safe harbor.<sup>54</sup>

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

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

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<sup>54</sup> See File No. SR-FINRA-2016-039.

Transactions in Securities

The majority of commenters supported the proposed amendment to permit member firms to place a temporary hold on a securities transactions where there is a reasonable belief of financial exploitation.<sup>55</sup> For example, NAPSA and the Philadelphia Financial Exploitation Task Force applauded the creation of a uniform national standard for placing holds on transactions related to suspected financial exploitation. Miami Investor Rights Clinic stated that substantial damage can result from securities transactions due to financial exploitation and that appropriate policies, procedures, and training can minimize any misapplication Rule 2165. Edward Jones stated that the financial harm resulting from exploitative transactions can take many forms, including selling long-held investments with low cost basis resulting in a significant tax liability, the sale of fixed income investments with yields more attractive than current rates, and the sale of variable annuities, which could lead to surrender charges. Edward Jones stated that the perpetrator of the exploitation could also utilize the proceeds of these sales to invest in high-risk securities further jeopardizing the financial security of the senior or vulnerable investor. Edward Jones stated that when balanced against the potential financial devastation to the senior or vulnerable investor, the proposal is a natural extension of the current rule that will further minimize the risk of financial harm and provide greater protection for senior and vulnerable investors.

In its comment to Regulatory Notice 19-27, PIABA cautioned FINRA against substantive changes to Rule 2165 that might conflict with state laws. However, PIABA

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<sup>55</sup> See CAI, Cambridge, Commonwealth, Edward Jones, Fidelity, FSI, IRI, LPL, Miami Investor Rights Clinic, MMLIS, NAPSA, Norcross, Philadelphia Financial Exploitation Task Force, SIFMA and Wells Fargo.

noted that the recently adopted state laws allow for holds on securities transactions and disbursements. Pittsburgh Clinic expressed concern that the proposed extension gives too much authority to member firms with limited oversight and that the customer may bear the risk of loss if firm makes the wrong call in placing a hold.

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

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

a temporary hold is placed on any related disbursement of funds out of the customer's account.

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

Some member firms already place holds on securities transactions pursuant to state law. As noted in Item 3 of this filing, currently, 20 states (with approximately half of the U.S. population) have enacted laws permitting investment advisers and broker-dealers to place temporary holds on disbursements and transactions. Amending Rule 2165 as proposed would create the first uniform national standard for placing holds on transactions related to suspected financial exploitation. Moreover, extending Rule 2165 to transactions would allow for consistent, national safeguards to avoid misapplication of temporary holds.

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

order where they believe that the associated compliance or legal risks are unacceptable.”<sup>56</sup>

#### Mandatory Holds

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

#### Cognitive Decline or Diminished Capacity

Some commenters supported extending Rule 2165 to situations where a firm has a reasonable belief that the customer has an impairment, such as diminished capacity, that renders the individual unable to protect his or her own interests, even though there is no evidence of financial exploitation.<sup>57</sup> Some Retrospective Review Stakeholders also supported extending Rule 2165 to these situations. However, other Retrospective Review Stakeholders expressed concerns that member firms are not well-positioned to determine if a customer is suffering from cognitive decline or diminished capacity in the absence of suspected financial exploitation. In addition, in comments to Regulatory Notice 19-27,

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<sup>56</sup> See SEC Staff Bulletin: Risks Associated with Omnibus Accounts Transacting in Low-Priced Securities (Nov. 12, 2020), available at <https://www.sec.gov/tm/risks-omnibus-accounts-transacting-low-priced-securities> (SEC Staff Bulletin). The SEC Staff Bulletin provides that, where the broker-dealer determines that the risks cannot be appropriately managed, and particularly in the context of low-priced securities transactions, a broker-dealer should consider, among other things, restricting or rejecting transactions effected on behalf of the customers of a foreign financial institution.

<sup>57</sup> See Miami Investor Rights Clinic, NAPSA, Philadelphia Financial Exploitation Task Force and Wells Fargo.

the Cornell Clinic, NASAA, PIABA and Pittsburgh Clinic expressed concerns that such an extension would give member firms too much discretion or would unfairly impede customer autonomy.

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

#### Trusted Contact Person

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

Under Rule 2165 as originally proposed in Regulatory Notice 15-37 (October 2015) (Notice 15-37 Proposal), if the trusted contact person was unavailable, a member firm placing a hold would have been required to contact an immediate family member, unless the member reasonably believed that the immediate family member was financially exploiting the customer. Commenters to the Notice 15-37 Proposal expressed concerns that the proposed requirement would impinge upon customer privacy and would be operationally challenging for member firms in identifying the customer's immediate family members. Due to these concerns, FINRA removed the requirements in the Notice 15-37 Proposal with respect to notifying an immediate family member when a temporary

hold is placed. In the rule filing to adopt Rule 2165, FINRA noted that Rule 2165 would not preclude a member firm from contacting an immediate family member or any other person if the member has customer consent to do so and that contacting such persons may be useful to member firms in administering customer accounts.<sup>58</sup>

NAPSA and the Philadelphia Financial Exploitation Task Force recommended that FINRA pursue efforts to promote use of trusted contact persons by customers. FINRA has taken steps to encourage customers to name trusted contact persons. For example, the SEC's Office of Investor Education and Advocacy and FINRA collaborated on an Investor Bulletin that helps customers understand the purpose of designating a trusted contact person for brokerage accounts, and encourages customers to designate a trusted contact person.<sup>59</sup> In addition, in April 2018, FINRA published a similar article providing information on the trusted contact person-related amendments to Rule 4512 and Rule 2165 for investors and member firms.<sup>60</sup> FINRA and the FINRA Investor Education Foundation have highlighted these articles on FINRA-managed social media channels, including Facebook and Twitter, and staff regularly discuss the benefits of designating a trusted contact when speaking with individual investors.

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<sup>58</sup> See File No. SR-FINRA-2016-039.

<sup>59</sup> The Investor Bulletin was published in March 2020 and is available on the SEC's website at <https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins-trusted-contact> and on FINRA's website at <https://www.finra.org/investors/insights/consider-adding-trusted-contact-to-your-account>.

<sup>60</sup> FINRA made a downloadable print version of the article available at [https://www.finra.org/sites/default/files/Protecting-Seniors-From-Financial-Exploitation\\_0.pdf](https://www.finra.org/sites/default/files/Protecting-Seniors-From-Financial-Exploitation_0.pdf).

### Reporting Requirements

Several commenters expressed concern that Rule 2165's safe harbor does not extend to complaints reportable on Forms U4 (Uniform Application for Securities Industry Registration or Transfer) or U5 (Uniform Termination Notice for Securities Industry Registration), or pursuant to Rule 4530 about an associated person whose actions were within the safe harbor and stated that some member firms and associated persons may choose not to place a hold pursuant to Rule 2165 because of concerns about a possible customer complaint.<sup>61</sup> These commenters requested guidance on when a Rule 2165-related complaint would be reportable and supported developing a specific problem code for reporting any Rule 2165-related complaint to FINRA pursuant to FINRA Rule 4530. FSI suggested that FINRA consider additional protections for financial professionals so they can confidently act when there is possible exploitation that could have long-term negative consequences on a client's financial future and overall well-being.

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

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

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<sup>61</sup> See Cambridge, FSI and SIFMA.

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

#### Customer Actions

Cambridge supported extending the safe harbor provided by Rule 2165 to protecting member firms and registered representatives from customer actions as a result of steps taken by a member firm pursuant to Rule 2165. FINRA previously addressed this issue when adopting Rule 2165, noting that member firms today make judgments with regard to making or withholding disbursements and already face litigation risks with respect to these decisions.<sup>62</sup> Rule 2165 is designed to provide regulatory relief to member firms by providing a safe harbor from FINRA rules for a determination to place a hold. Some states may separately provide immunity to member firms under state law.

#### Scope of Rule 2165

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

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<sup>62</sup> See File No. SR-FINRA-2016-039.

some commenters suggested including an age over 65 in the definition.<sup>63</sup> The inclusion of persons 65 and older in the definition reflects, in part, that federal agencies, FINRA and NASAA have focused on persons age 65 and older for various senior initiatives. In addition, the definition of “specified adult” in Rule 2165(a)(1) also includes persons age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests.

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

NAPSA and the Philadelphia Financial Exploitation Task Force recommended that investment companies, such as mutual funds, be permitted to place temporary holds. In 2018, staff in the SEC’s Division of Investment Management issued a no-action letter to the Investment Company Institute stating that the staff would not recommend enforcement action if, consistent with the conditions in the letter, a transfer agent, acting on behalf of a mutual fund, temporarily delayed for more than seven days the disbursement of redemption proceeds from the mutual fund account of a specified adult held directly with the transfer agent based on a reasonable belief that financial exploitation of the specified adult has occurred, is occurring, has been attempted, or will be attempted.<sup>64</sup> The no-action letter permits mutual fund transfer agents to protect specified adult shareholders from financial exploitation to the same extent that broker-dealers may do so currently under FINRA Rule 2165.

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<sup>63</sup> See File No. SR-FINRA-2016-039.

<sup>64</sup> See Investment Company Institute, SEC No-Action Letter (June 1, 2018).

If a member firm places a temporary hold, Rule 2165 requires the member to immediately initiate an internal review of the facts and circumstances that caused the member to reasonably believe that financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted. FSI recommended that FINRA provide additional guidance to member firms on conducting these internal reviews. FSI stated that state regulators and agencies have the appropriate expertise to conduct these types of investigations and member firms work cooperatively to provide state regulators and agencies with requested information. FSI stated that member firms have access to internal records that evidence the customer's regular trading and account disbursement activity, but firms do not want to, for example, front-run and jeopardize a criminal investigation by trying to contact and interview witnesses.

As stated in the rule filing proposing the adoption of Rule 2165, FINRA believes that the appropriate internal review will depend on the facts and circumstances of the situation.<sup>65</sup> Member firms have discretion in conducting a reasonable internal review under proposed Rule 2165. In addition, Rule 2165 gives member firms flexibility regarding notifying some parties when the member firm reasonably suspects that the party is involved in the financial exploitation. Specifically, Rule 2165(b)(1)(B)(i)-(ii) provides that a member firm is not required to provide notification of a temporary hold to a party authorized to transact business on the account or the trusted contact person if the member firm reasonably suspects that the authorized party or trusted contact person, respectively, may be engaged in the financial exploitation of the specified adult.

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<sup>65</sup> See File No. SR-FINRA-2016-039.

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

Rule 3260's scope and purpose are distinguishable from permitting a member firm to place a temporary hold on a transaction when there is a reasonable belief that the customer is being financially exploited. Rule 3260 addresses the creation and maintenance of discretionary accounts and requires firms to have procedures to identify and prevent excessive trading or "churning" in such accounts. Rule 3260 is intended to protect customers from the misuse of discretionary power by firms and associated persons.

In considering whether Rule 2165's safe harbor needs to be extended to address rules relating to order execution, "[b]roker-dealers are reminded that nothing under the federal securities laws or FINRA rules obligates them to accept an order where they believe that the associated compliance or legal risks are unacceptable."<sup>66</sup>

#### Outreach and Collaboration

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

- Carrying out a multi-faceted investor protection campaign through the FINRA Foundation aimed at promoting awareness about, and support for, the prevention

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<sup>66</sup> See SEC Staff Bulletin.

of financial fraud and exploitation, while simultaneously empowering financial consumers to protect themselves and their loved ones, using tactics including:

- Training law enforcement and victim advocates to detect, investigate, and assist consumers with concerns of financial fraud and exploitation in collaboration with federal and state securities regulators, APS groups, NAPSA, the National Center for Victims of Crime, the National White Collar Crime Center, and staff from FINRA's National Cause and Financial Crimes Detection Programs;
- Engaging in consumer outreach—often in coordination with the SEC, CFPB, state securities regulators, and nonprofits such as AARP and Better Business Bureaus—to empower financial consumers to spot, avoid, and report financial fraud;
- Conducting, supporting, and disseminating research focused on financial exploitation and fraud as well as aging and financial decision-making, which is shared with internal and external stakeholders;<sup>67</sup>
- Collaborating with Committees and Task Forces focused on issues of financial fraud and exploitation, including working with the Department of Justice's Elder Justice Initiative, serving on NAPSA's Financial Exploitation Advisory Board, serving on NASAA's Senior Issues and Diminished Capacity Committee Advisory Council, participating on various multi-disciplinary teams (MDTs) aimed at protecting and assisting vulnerable adults, and

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<sup>67</sup> See FINRA Investor Education Foundation Investor Protection Campaign Research, available at [www.finrafoundation.org/fraudresearch](http://www.finrafoundation.org/fraudresearch).

holding joint trainings with the CFPB's Office of Older Americans, and meeting periodically with state securities regulators and states' attorneys general to discuss senior investor protection issues;<sup>68</sup>

- Issuing alerts and articles that educate investors about important issues and highlighting risks facing senior investors;<sup>69</sup>
- Launching the dedicated FINRA Securities Helpline for Seniors<sup>®</sup>—available at (844) 57-HELPS—to provide senior investors and their family members with a supportive place to get assistance from specially trained FINRA staff related to concerns they have with their brokerage accounts and investments;
- Collaborating with NASAA and the SEC to address senior investor protection, including issuing a Senior Safe Act Fact Sheet designed to raise awareness among member firms, investment advisers and transfer agents about the Act and its immunity provisions;<sup>70</sup>
- Producing and presenting on in-person and virtual panels addressing senior investor protection with the SEC, state securities regulators, NASAA, APS offices, NAPSA, FBI and other agencies; and

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<sup>68</sup> See Protecting Senior Investors 2015–2020: An Update on the FINRA Securities Helpline for Seniors, Other FINRA Initiatives and Member Firm Practices (Apr. 2020).

<sup>69</sup> See, e.g., articles such as Protecting Seniors from Financial Exploitation and Don't Give in to Power of Attorney Pressure; Investor Alerts such as Power of Attorney and Your Investments–10 Tips, Plan for Transition: What You Should Know About the Transfer of Brokerage Account Assets on Death, and Seniors Beware: What You Should Know About Life Settlements; and FINRA's Retirement webpage for investors.

<sup>70</sup> See [http://www.finra.org/sites/default/files/senior\\_safe\\_act\\_factsheet.pdf](http://www.finra.org/sites/default/files/senior_safe_act_factsheet.pdf).

- Meeting with adult protective services staff in multiple states, in part through NAPSA, to increase coordination of senior investor protection efforts and highlight FINRA Rule 2165's provision that APS can direct a member firm to terminate or extend a temporary hold authorized by the Rule.

**6. Extension of Time Period for Commission Action**

FINRA does not consent at this time to an extension of the time period for Commission action specified in Section 19(b)(2) of the Act.<sup>71</sup>

**7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2) or Section 19(b)(7)(D)**

Not applicable.

**8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission**

Not applicable.

**9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act**

Not applicable.

**10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act**

Not applicable.

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<sup>71</sup> 15 U.S.C. 78s(b)(2).

**11. Exhibits**

Exhibit 1. Completed notice of proposed rule change for publication in the Federal Register.

Exhibit 2a. Regulatory Notice 20-34 (October 2020).

Exhibit 2b. List of commenters.

Exhibit 2c. Comments received in response to Regulatory Notice 20-34.

Exhibit 5. Text of proposed rule change.

EXHIBIT 1

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

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

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

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

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

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

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

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.

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

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

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

1. Purpose

Protection of Senior Investors

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

- Identifying senior investor issues as an examination priority;<sup>3</sup>
- Launching the dedicated FINRA Securities Helpline for Seniors®—available at 844-57-HELPS—to provide senior investors and their family members with a supportive place to get assistance from specially trained

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

FINRA staff related to concerns they have with their brokerage accounts and investments;<sup>4</sup>

- Creating national standards that give member firms tools—including permitting firms to place temporary holds on disbursements when they have a reasonable belief of financial exploitation and requiring firms to request information from customers about a trusted contact—to address suspected financial exploitation of senior investors and other vulnerable adults (i.e., FINRA Rules 2165 and 4512 (Customer Account Information));<sup>5</sup>
- Collaborating with the North American Securities Administrators Association (NASAA) and the SEC to address senior investor protection, including issuing a Senior Safe Act Fact Sheet designed to raise awareness among member firms, investment advisers and transfer agents about the Act and its immunity provisions;<sup>6</sup>
- Issuing alerts and articles educating investors about important issues and highlighting risks facing senior investors;<sup>7</sup>

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

<sup>5</sup> See Regulatory Notice 17-11 (March 2017).

<sup>6</sup> See [http://www.finra.org/sites/default/files/senior\\_safe\\_act\\_factsheet.pdf](http://www.finra.org/sites/default/files/senior_safe_act_factsheet.pdf).

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

- Conducting and funding research on senior investors and financial fraud, and engaging with national, state and grassroots partners to develop and distribute fraud prevention resources, educate consumers, and provide training for law enforcement professionals, victim advocates, and other people on the front lines of fighting financial fraud;
- Issuing Regulatory Notices emphasizing member firms' obligations to senior investors and providing guidance on how to fulfill those obligations;<sup>8</sup> and
- Bringing disciplinary actions for misconduct against senior investors.<sup>9</sup>

#### Retrospective Review

In August 2019, FINRA launched a retrospective review to assess the effectiveness and efficiency of its rules and administrative processes that help protect senior investors from financial exploitation. The retrospective review process has two phases: the assessment phase and the action phase.<sup>10</sup> During the assessment phase,

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

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

<sup>10</sup> The stakeholders who provided input during the assessment phase of the retrospective review are collectively referred to herein as the "Retrospective Review Stakeholders."

FINRA first sought comment in Regulatory Notice 19-27 (August 2019) on several questions with respect to addressing financial exploitation and other circumstances of financial vulnerability for senior investors. FINRA received 22 comment letters to Regulatory Notice 19-27.<sup>11</sup>

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<sup>11</sup> See Letter from Megan Valent, Legal Intern, and Teresa J. Verges, Director, University of Miami School of Law, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 1, 2019; Letter from Jennifer L. Szaro, Lara May & Associates, LLC, and Robert L. Hamman, President, First Asset Financial Inc., to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 4, 2019; Letter from William A. Jacobson, Esq., Clinical Professor of Law and Director, Securities Law Clinic Cornell Law School, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 7, 2019; Letter from Kathleen Quinn, Board President, National Adult Protective Services Association, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 7, 2019; Letter from Joe Snyder, Chair, Philadelphia Financial Exploitation Task Force dated Oct. 7, 2019; Letter from Seth A. Miller, General Counsel, Executive Vice President, and Chief Risk Officer, Cambridge Investment Research, Inc., to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Eric Arnold, Clifford Kirsch and Holly Smith of Eversheds Sutherland on behalf of the Committee of Annuity Insurers, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Christopher W. Bok, Director, Financial Information Forum, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Marc Fitapelli, Esq., Fitapelli Kurta, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Robin M. Traxler, Senior Vice President, Policy & Deputy General Counsel, Financial Services Institute, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Maureen K. Paparo, Legal Intern, Lincoln Square Legal Services, Inc., to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Courtney Rogers Reid, Lead Counsel, Broker-Dealer and Investment Adviser Practice Group, MML Investors Services, LLC, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Christopher Gerold, President, NASAA, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Nancy Brown, President and Co-Chair, and Dian VanderWell, Opportunity Alliance Nevada, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Christine Lazaro, President, and Samuel B. Edwards, Executive Vice President, Public Investors Advocate Bar Association, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Lisa J. Bleier,

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

Finally, FINRA developed an anonymous survey that was distributed to all member firms in the first quarter of 2020. The purpose of the survey was to collect

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Managing Director, SIFMA, dated Oct. 8, 2019; Letter from Christine Lazaro, Professor of Clinical Legal Education and Director, St. John's University School of Law Securities Arbitration Clinic, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Alice L. Stewart, Director, and Rachael T. Shaw, Adjunct Professor, University of Pittsburgh School of Law – Securities Arbitration Clinic, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Ron Long, Head of Elder Client Initiatives Center of Excellence, Wells Fargo & Company, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 8, 2019; Letter from Erin K. Lineham, Associate General Counsel - Compliance, Raymond James & Associates, Inc., to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, dated Oct. 29, 2019; Letter from Marin E. Gibson, Managing Director and Associate General Counsel, SIFMA, dated Nov. 15, 2019; Letter from Anonymous dated Feb. 26, 2020.

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

<sup>13</sup> See id.

information in order to validate the feedback received and to provide an additional opportunity for all member firms to provide their views.<sup>14</sup>

The review indicated that FINRA's steps to protect seniors have provided helpful and effective tools in the fight against financial exploitation, but it also suggested some additional tools, guidance and rule changes. In October 2020, FINRA published Regulatory Notice 20-34 (October 2020): (1) summarizing the retrospective rule review process, including the predominant themes that emerged from Retrospective Review Stakeholder feedback; (2) seeking comment on proposed amendments to Rule 2165 to further address suspected financial exploitation of senior investors and other specified adults; and (3) providing guidance to aid member firms and senior investors and other specified adults.<sup>15</sup>

#### Rule 2165

Rule 2165 is the first uniform national standard for placing temporary holds on disbursements to address suspected financial exploitation.<sup>16</sup> Rule 2165 permits a member firm to place a temporary hold on a disbursement of funds or securities from the account

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

<sup>15</sup> The proposed amendments to Rule 2165 set forth in Regulatory Notice 20-34 are referred to herein as the "Notice 20-34 Proposal."

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

of a “specified adult”<sup>17</sup> customer when the firm reasonably believes that financial exploitation of that adult has occurred, is occurring, has been attempted or will be attempted. Prior to the adoption of Rule 2165, some member firms expressed concern that placing a temporary hold on suspicious disbursements was not explicitly permitted by FINRA rules.

To address these concerns, Rule 2165 provides member firms and their associated persons with a safe harbor from FINRA Rules 2010 (Standards of Commercial Honor and Principles of Trade), 2150 (Improper Use of Customers’ Securities or Funds; Prohibition Against Guarantees and Sharing in Accounts) and 11870 (Customer Account Transfer Contracts) when member firms exercise discretion in placing temporary holds on disbursements of funds or securities from the accounts of specified adults consistent with the requirements of Rule 2165. FINRA encourages member firms to take advantage of the Rule 2165 safe harbor where there is a reasonable belief of customer financial exploitation.

#### Rule Safeguards

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

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<sup>17</sup> The definition of “specified adult” in Rule 2165 covers those investors who are particularly susceptible to financial exploitation. A “specified adult” is (A) a natural person age 65 and older or (B) a natural person age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests. See Rule 2165(a)(1). Supplementary Material .03 to Rule 2165 provides that a member firm’s reasonable belief that a natural person age 18 and older has a mental or physical impairment that renders the individual unable to protect his or her own interests may be based on the facts and circumstances observed in the member firm’s business relationship with the person.

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

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

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

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

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<sup>18</sup> See Rule 2165(b)(1)(B).

<sup>19</sup> See Rule 2165(b)(1)(C).

<sup>20</sup> See Rule 2165(c)(1).

<sup>21</sup> See Rule 2165(c)(2).

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

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

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

#### Responding to Suspected Financial Exploitation

Temporary holds on disbursements have played a critical role in providing member firms a way to quickly respond to suspicions of financial exploitation before potentially ruinous losses occur for the customer. For example, FINRA's report for the five-year anniversary of the FINRA Securities Helpline for Seniors® highlights several matters that illustrate the positive impact of placing temporary holds on disbursements to address financial exploitation.<sup>24</sup> The matters include temporary holds placed by member firms to prevent senior investors from losing:

- \$200,000 (representing approximately two-thirds of the investor's account) related to a Central Intelligence Agency (CIA) lawsuit scam;

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<sup>22</sup> See Supplementary Material .02 to Rule 2165.

<sup>23</sup> See Rule 2165(d).

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

- \$10,000 in a lottery scam;
- \$60,000 in a romance scam; and
- \$50,000 to financial exploitation by a brother-in-law.

#### Proposed Amendments to Rule 2165

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

#### Hold Period

Rule 2165 currently allows a member firm to place a temporary hold on a specified adult customer's account for up to 25-business days if the criteria in the rule are satisfied. More specifically, the temporary hold authorized by Rule 2165 would expire not later than 15-business days after the date that the member first placed the temporary

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

hold on the disbursement of funds or securities, unless otherwise terminated or extended by a state regulator or agency or court of competent jurisdiction.<sup>26</sup> In addition, provided that the member firm's internal review of the facts and circumstances supports its reasonable belief that the financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted, the rule permits the member to extend the temporary hold for an additional 10-business days, unless otherwise terminated or extended by a state regulator or agency or court of competent jurisdiction.<sup>27</sup>

Retrospective Review Stakeholders and commenters to the Notice 20-34 Proposal generally supported extending the current 25-business day hold period to provide member firms with a longer period to resolve matters.<sup>28</sup> These Retrospective Review Stakeholders and commenters to the Notice 20-34 Proposal indicated that the current period may not be sufficient when a matter is under consideration by a state regulator, state agency or court. Notably, this view was shared by NAPSA and the Philadelphia Financial Exploitation Task Force in comments to Regulatory Notice 19-27 and the Notice 20-34 Proposal, with both commenters stating that adult protective services (APS) agencies, state regulators and law enforcement typically need more time to conduct thorough investigations. In contrast, in comments to Regulatory Notice 19-27 and the Notice 20-34 Proposal, NASAA supported retaining the current 25-business day period,

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<sup>26</sup> See Rule 2165(b)(2).

<sup>27</sup> See Rule 2165(b)(3).

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

which aligns with the hold period provided in the NASAA Model Act to Protect Vulnerable Adults from Financial Exploitation (NASAA Model Act).<sup>29</sup>

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

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

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

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

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

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

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

<sup>32</sup> See proposed Rule 2165(d)(6).

Transactions in Securities

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

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

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

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

advisers and broker-dealers to place temporary holds on disbursements and transactions.<sup>35</sup>

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

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

#### Need for the Proposed Amendments

Retrospective Review Stakeholders and commenters to the Notice 20-34 Proposal consistently indicated the prevalence of and problems associated with financial exploitation of senior investors,<sup>36</sup> including the potential for significant and longstanding

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<sup>35</sup> As of June 2021, the following states permit holds on disbursement and transactions: Arkansas, Arizona, California, Florida, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Dakota, Oklahoma, South Carolina, Texas, Utah, Virginia, Washington and West Virginia.

<sup>36</sup> See, e.g., comments to the Notice 20-34 Proposal from PIABA. See also Consumer Financial Protection Bureau, Office of Financial Protection for Older

harm to customers.<sup>37</sup> Moreover, Retrospective Review Stakeholders and commenters to the Notice 20-34 Proposal generally agree that member firms need tools to address suspected financial exploitation.<sup>38</sup>

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

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Americans, Suspicious Activity Reports on Elder Financial Exploitation: Issues and Trends (Feb. 2019) (highlighting that SAR filings on elder financial exploitation quadrupled from 2013 to 2017). See also U.S. Securities and Exchange Commission, Office of the Investor Advocate, Elder Financial Exploitation (June 2018) (providing an overview of studies on the prevalence of senior financial exploitation).

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

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

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

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

Some Retrospective Review Stakeholders and commenters to the Notice 20-34 Proposal believe that the proposed extension of the hold period is too long and could be

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

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

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

harmful to customers.<sup>42</sup> Commenters to the Notice 20-34 Proposal stated that some matters can be quickly resolved after placing a temporary hold, but complex matters that involve investigations by state regulators or agencies or legal actions in a court (e.g., financial exploitation of an elderly customer by a family member or caregiver) may need additional time to resolve.<sup>43</sup> In considering the appropriate time period, it is notable that NAPSA and the Philadelphia Financial Exploitation Task Force —representing APS programs which play a critical role in investigating suspicions of financial exploitation—also expressed in their comments to the Notice 20-34 Proposal the need for additional time to conduct investigations. NAPSA’s comment letter to the Notice 20-34 Proposal also shared data in support of the need for a longer hold period in Rule 2165 that the average investigation duration of reported matters to the federal National Adult Maltreatment Reporting System (NAMRS) is 52.6 days.

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

These state laws represent a patchwork where some customers may be afforded greater protection from financial exploitation than other customers. In contrast, Rule 2165 provides a uniform national standard for placing temporary holds when there is a reasonable belief of financial exploitation. Moreover, Rule 2165 incorporates numerous

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

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

safeguards that apply to each temporary hold and that are designed to ensure that there is not a misapplication of the rule.

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

## 2. Statutory Basis

The proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>44</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 allowing for additional time for firms to resolve matters and for APS agencies, state regulators and law enforcement to conduct thorough investigations of suspected financial exploitation. Customers would benefit from this extension in instances where the additional time allows for a positive identification of financial exploitation and retention of the disbursement amount within the account. The proposed rule change also will allow firms to place temporary holds on transactions, which should prevent harm to exploited customers such as being subject to adverse tax consequences, early withdraw penalties or investments that do not align with their investor profiles. Moreover, the rule incorporates numerous safeguards that apply to each temporary hold and that are designed to ensure that there is not a misapplication of the rule.

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<sup>44</sup> 15 U.S.C. 78q-3(b)(6).

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

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

Economic Impact Assessment

FINRA has undertaken an economic impact assessment, as set forth below, to further analyze the regulatory need for the proposed rule change, its potential economic impacts, including anticipated costs, benefits, and distributional and competitive effects, relative to the current baseline, and the alternatives FINRA considered in assessing how best to meet its regulatory objective.

Regulatory Need

FINRA is active in its efforts to protect senior investors from financial exploitation. In the context of these efforts, and with evidence of a growing trend of such exploitation<sup>45</sup>, FINRA conducted a review of relevant existing rules and administrative processes that help protect senior investors from financial exploitation. Through this review, FINRA has received feedback on the effectiveness and efficiency of Rule 2165.

Economic Baseline

The economic baseline for the proposed rule amendments is the current Rule 2165 and its use by member firms, as well as existing firm policies and state laws related to protecting senior investors. As discussed above, in August 2019, FINRA launched a retrospective review to assess the effectiveness and efficiency of its rules and administrative processes that help protect senior investors from financial exploitation. To

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See supra note 36.

conduct the assessment phase of the retrospective rule review, FINRA first sought comment in Regulatory Notice 19-27. FINRA obtained input from several advisory committees comprising member firms of different sizes and business models, investor protection advocates, and member firms, and from trade associations. In addition, FINRA obtained the perspective of its operating departments that touch the rules and their administration.

FINRA also distributed a survey to all member firms in the first quarter of 2020, to which a subset of firms, ranging from small to large firms, responded. The purpose of the survey was to collect information and to provide member firms an additional opportunity to provide their views. The economic baseline, regarding the current application of the rule by firms and the effectiveness and efficiency of the rule, is established using the information obtained during the assessment phase.

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

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

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

#### Economic Impacts

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

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

The proposed amendments would also extend Rule 2165 to permit a member firm to place a temporary hold on a transaction in securities when the firm has a reasonable belief that the customer is being financially exploited. Twenty states, together containing approximately half of the U.S. population, already permit firms to place temporary holds on transactions. The proposed amendments would impact firms in all states by providing a safe harbor under FINRA rules for firms to place holds on transactions. The extent of the impact would vary across firms depending on their decision to take advantage of the proposed extension of Rule 2165 to transactions.<sup>47</sup> The proposed amendments would also impact the customers of those firms. In instances when a firm's hold on a transaction prevented financial exploitation, the customer whose transaction was held would benefit from not incurring the negative financial consequences of the transaction. In instances when a transaction hold was executed and no financial exploitation was found, the economic impact of the hold stems primarily from the magnitude of the security's price movement (positive or negative) between the time the hold was placed and the time it was lifted.

#### Alternatives Considered

FINRA considered various alternatives to the proposed rule amendments. First, FINRA considered different possible extensions of the temporary hold period, ranging from no extension to an extension of up to 75-business days. On the one hand, a longer temporary hold period would allow member firms more time to investigate and contact

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

the relevant parties, as well as obtain input from a state regulator, agency, or court if needed. Alternatively, an extended temporary hold period could result in increased costs to both investors and firms.<sup>48</sup> These include increased costs to investors from lost investment opportunities or liquidity problems and increased costs to firms from legal challenges to investigations, all of which are anticipated to be related to the length of the hold on disbursements. Considering these factors, as well as information from the various outreach efforts and stakeholder engagements, FINRA believes that the proposal strikes a balance across the spectrum of possible options.

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

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

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

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

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

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

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

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

Support for the Notice 20-34 Proposal

Fourteen commenters expressed support for the Notice 20-34 Proposal.<sup>51</sup> Several commenters stated that the proposed amendments will better protect vulnerable investors from financial exploitation. For example, Miami Investor Rights Clinic stated that it "fully supports" the proposed amendments as they will provide greater protection to

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<sup>50</sup> See Exhibit 2b for a list of abbreviations assigned to commenters.

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

seniors and vulnerable adults that may be victims of financial exploitation. IRI also stated that the proposed amendments will better enable firms to prevent the financial exploitation of vulnerable Americans.

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

#### Opposition to or Concerns with the Notice 20-34 Proposal

PIABA supports enhanced protections for investors but expressed concern that member firms could misuse the proposed amendments. PIABA recommended that FINRA require in Rule 2165 that the member firm: (1) update its written supervisory manuals to include training and review transactions suspected of elder abuse; (2) include in its retained records documentation of the firm's reasonable efforts to quickly investigate the matter; and (3) file a report with the appropriate APS agency and state regulator as soon as reasonably practical but no later than seven business days from the initial hold period.

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

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

Pittsburgh Clinic does not support current Rule 2165 or the proposed amendments because it believes that member firms could misuse temporary holds for their financial benefit. FINRA has extensively addressed the concerns of potential misuse above in section A under the "Need for the Proposed Amendments."

Pittsburgh Clinic also said that the survey of member firms should not be relied on to assess Rule 2165 or the proposed amendments because: (1) the survey respondents are member firms that stand to benefit from an increase to the extension of the hold period, as well as the rule's safe harbor provisions; (2) the survey respondents were not required

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<sup>52</sup> See Rule 2165(d).

<sup>53</sup> See Supplementary Material .02 to Rule 2165.

to provide any information to support their claims; and (3) the survey respondents represent an inadequate and unrepresentative sample size (the survey was provided to 3,516 member firms, of which only 238 member firms responded).

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

The purpose of the survey distributed to all member firms was to collect information in order to validate the feedback received and to provide an additional opportunity for all member firms to provide their views. There were 238 firms that responded to the survey, and the breakdown of these firm survey respondents according

to firm size, as measured by the number of registered representatives, and the comparison to the general population of member firms, is provided in Table 1 below. With respect to the Pittsburgh Clinic comment letter, FINRA notes that: (1) the membership survey is one tool frequently used by FINRA in its outreach efforts to solicit information from its members; (2) the response rate mentioned is a lower bound when considering relevant member firms; and (3) the breakdown of survey respondents by firm size is mostly representative with respect to the full member firm population, as summarized in Table 1.

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

### Hold Period

The majority of commenters supported the proposed amendment to extend a temporary hold for an additional 30 business days if the member firm has reported the matter to a state regulator or agency or a court of competent jurisdiction.<sup>54</sup> For example, Edward Jones stated that the firm is often able to quickly resolve matters where it suspects financial exploitation of a senior or vulnerable investor by engaging the customer's trusted contact person or using other tools, but the firm has experienced situations where the current 25-day period provided under Rule 2165 is insufficient. Edward Jones notes having experienced this situation when working with state agencies,

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

such as APS, to investigate a case of suspected financial exploitation. Edward Jones stated that some APS agencies are not adequately resourced to quickly review these matters and yet are hesitant to request an extension of a hold until they determine whether exploitation exists.

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

While acknowledging that an adequate period for review of the facts and circumstances must be allowed, Pittsburgh Clinic stated that the proposed longer hold period increases the possibility that a member firm could misuse a hold to harm an investor. Pittsburgh Clinic stated that the proposed hold period is too long because customers may need the funds to pay for living expenses. Pittsburgh Clinic also expressed concern that Rule 2165 does not include a reporting requirement unless a member firm wants to avail itself of the additional 30-business day extension.

NASAA believes that the current 25-business day hold period, with the authority for state regulators or agencies or the courts to terminate or extend, is the better approach as it provides time to conduct the investigation and avoids unintended hardships from

lengthy delays. Moreover, NASAA supports involving state regulators or agencies or the courts within the initial 15-business day hold period specified in Rule 2165(b)(2).

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

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

To provide member firms with additional time to resolve matters and for APS agencies, state regulators and law enforcement to conduct thorough investigations, FINRA is proposing amending Rule 2165 to permit extending a temporary hold for an additional 30 business days if the member firm has reported the matter to a state agency or a court of competent jurisdiction. Extending the hold period as proposed is intended to

address the complex matters that need additional time to resolve. In addition, some states mandate reporting of suspected financial exploitation by financial institutions, including broker-dealers, within a specified period of time. FINRA expects member firms to comply with all applicable state requirements, including reporting requirements.

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

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

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

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<sup>55</sup> See File No. SR-FINRA-2016-039.

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

#### Transactions in Securities

The majority of commenters supported the proposed amendment to permit member firms to place a temporary hold on a securities transactions where there is a reasonable belief of financial exploitation.<sup>56</sup> For example, NAPSA and the Philadelphia Financial Exploitation Task Force applauded the creation of a uniform national standard for placing holds on transactions related to suspected financial exploitation. Miami Investor Rights Clinic stated that substantial damage can result from securities transactions due to financial exploitation and that appropriate policies, procedures, and training can minimize any misapplication Rule 2165. Edward Jones stated that the financial harm resulting from exploitative transactions can take many forms, including selling long-held investments with low cost basis resulting in a significant tax liability, the sale of fixed income investments with yields more attractive than current rates, and the sale of variable annuities, which could lead to surrender charges. Edward Jones

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

stated that the perpetrator of the exploitation could also utilize the proceeds of these sales to invest in high-risk securities further jeopardizing the financial security of the senior or vulnerable investor. Edward Jones stated that when balanced against the potential financial devastation to the senior or vulnerable investor, the proposal is a natural extension of the current rule that will further minimize the risk of financial harm and provide greater protection for senior and vulnerable investors.

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

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

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

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

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

to transactions would allow for consistent, national safeguards to avoid misapplication of temporary holds.

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

#### Mandatory Holds

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

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

Cognitive Decline or Diminished Capacity

Some commenters supported extending Rule 2165 to situations where a firm has a reasonable belief that the customer has an impairment, such as diminished capacity, that renders the individual unable to protect his or her own interests, even though there is no evidence of financial exploitation.<sup>58</sup> Some Retrospective Review Stakeholders also supported extending Rule 2165 to these situations. However, other Retrospective Review Stakeholders expressed concerns that member firms are not well-positioned to determine if a customer is suffering from cognitive decline or diminished capacity in the absence of suspected financial exploitation. In addition, in comments to Regulatory Notice 19-27, the Cornell Clinic, NASAA, PIABA and Pittsburgh Clinic expressed concerns that such an extension would give member firms too much discretion or would unfairly impede customer autonomy.

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

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

Trusted Contact Person

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

Under Rule 2165 as originally proposed in Regulatory Notice 15-37 (October 2015) (Notice 15-37 Proposal), if the trusted contact person was unavailable, a member firm placing a hold would have been required to contact an immediate family member, unless the member reasonably believed that the immediate family member was financially exploiting the customer. Commenters to the Notice 15-37 Proposal expressed concerns that the proposed requirement would impinge upon customer privacy and would be operationally challenging for member firms in identifying the customer’s immediate family members. Due to these concerns, FINRA removed the requirements in the Notice 15-37 Proposal with respect to notifying an immediate family member when a temporary hold is placed. In the rule filing to adopt Rule 2165, FINRA noted that Rule 2165 would not preclude a member firm from contacting an immediate family member or any other person if the member has customer consent to do so and that contacting such persons may be useful to member firms in administering customer accounts.<sup>59</sup>

NAPSA and the Philadelphia Financial Exploitation Task Force recommended that FINRA pursue efforts to promote use of trusted contact persons by customers. FINRA has taken steps to encourage customers to name trusted contact persons. For example, the SEC’s Office of Investor Education and Advocacy and FINRA collaborated on an Investor Bulletin that helps customers understand the purpose of designating a

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<sup>59</sup> See File No. SR-FINRA-2016-039.

trusted contact person for brokerage accounts, and encourages customers to designate a trusted contact person.<sup>60</sup> In addition, in April 2018, FINRA published a similar article providing information on the trusted contact person-related amendments to Rule 4512 and Rule 2165 for investors and member firms.<sup>61</sup> FINRA and the FINRA Investor Education Foundation have highlighted these articles on FINRA-managed social media channels, including Facebook and Twitter, and staff regularly discuss the benefits of designating a trusted contact when speaking with individual investors.

#### Reporting Requirements

Several commenters expressed concern that Rule 2165's safe harbor does not extend to complaints reportable on Forms U4 (Uniform Application for Securities Industry Registration or Transfer) or U5 (Uniform Termination Notice for Securities Industry Registration), or pursuant to Rule 4530 about an associated person whose actions were within the safe harbor and stated that some member firms and associated persons may choose not to place a hold pursuant to Rule 2165 because of concerns about a possible customer complaint.<sup>62</sup> These commenters requested guidance on when a Rule 2165-related complaint would be reportable and supported developing a specific problem code for reporting any Rule 2165-related complaint to FINRA pursuant to FINRA Rule

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

<sup>61</sup> FINRA made a [downloadable print version](https://www.finra.org/sites/default/files/Protecting-Seniors-From-Financial-Exploitation_0.pdf) of the article available at [https://www.finra.org/sites/default/files/Protecting-Seniors-From-Financial-Exploitation\\_0.pdf](https://www.finra.org/sites/default/files/Protecting-Seniors-From-Financial-Exploitation_0.pdf).

<sup>62</sup> See Cambridge, FSI and SIFMA.

4530. FSI suggested that FINRA consider additional protections for financial professionals so they can confidently act when there is possible exploitation that could have long-term negative consequences on a client's financial future and overall well-being.

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

FINRA does not currently plan to propose guidance regarding when a Rule 2165-related complaint would be reportable or develop a specific problem code for reporting any Rule 2165-related complaint to FINRA pursuant to FINRA Rule 4530. In considering whether a complaint is reportable, member firms should use the existing publicly available guidance. FINRA may reconsider this issue or develop a specified problem code for reporting any Rule 2165-related complaint to FINRA pursuant to FINRA Rule 4530 if complaints are reported in the future and they appear to have a detrimental impact on the protection of seniors and other vulnerable adults.

#### Customer Actions

Cambridge supported extending the safe harbor provided by Rule 2165 to protecting member firms and registered representatives from customer actions as a result of steps taken by a member firm pursuant to Rule 2165. FINRA previously addressed this issue when adopting Rule 2165, noting that member firms today make judgments with regard to making or withholding disbursements and already face litigation risks with

respect to these decisions.<sup>63</sup> Rule 2165 is designed to provide regulatory relief to member firms by providing a safe harbor from FINRA rules for a determination to place a hold. Some states may separately provide immunity to member firms under state law.

#### Scope of Rule 2165

Because some state temporary hold laws cover customers younger than 65 years of age, LPL suggested that FINRA amend the definition of “specified adult” in Rule 2165(a)(1) to include persons 60 years of age and older. In adopting Rule 2165, FINRA solicited feedback regarding whether the ages used in the definition of “specified adult” in proposed Rule 2165 should be modified or eliminated. As discussed in the rule filing proposing Rule 2165, some commenters suggested including an age lower than 65 and some commenters suggested including an age over 65 in the definition.<sup>64</sup> The inclusion of persons 65 and older in the definition reflects, in part, that federal agencies, FINRA and NASAA have focused on persons age 65 and older for various senior initiatives. In addition, the definition of “specified adult” in Rule 2165(a)(1) also includes persons age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests.

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

NAPSA and the Philadelphia Financial Exploitation Task Force recommended that investment companies, such as mutual funds, be permitted to place temporary holds.

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<sup>63</sup> See File No. SR-FINRA-2016-039.

<sup>64</sup> See File No. SR-FINRA-2016-039.

In 2018, staff in the SEC's Division of Investment Management issued a no-action letter to the Investment Company Institute stating that the staff would not recommend enforcement action if, consistent with the conditions in the letter, a transfer agent, acting on behalf of a mutual fund, temporarily delayed for more than seven days the disbursement of redemption proceeds from the mutual fund account of a specified adult held directly with the transfer agent based on a reasonable belief that financial exploitation of the specified adult has occurred, is occurring, has been attempted, or will be attempted.<sup>65</sup> The no-action letter permits mutual fund transfer agents to protect specified adult shareholders from financial exploitation to the same extent that broker-dealers may do so currently under FINRA Rule 2165.

If a member firm places a temporary hold, Rule 2165 requires the member to immediately initiate an internal review of the facts and circumstances that caused the member to reasonably believe that financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted. FSI recommended that FINRA provide additional guidance to member firms on conducting these internal reviews. FSI stated that state regulators and agencies have the appropriate expertise to conduct these types of investigations and member firms work cooperatively to provide state regulators and agencies with requested information. FSI stated that member firms have access to internal records that evidence the customer's regular trading and account disbursement activity, but firms do not want to, for example, front-run and jeopardize a criminal investigation by trying to contact and interview witnesses.

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

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

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

Rule 3260's scope and purpose are distinguishable from permitting a member firm to place a temporary hold on a transaction when there is a reasonable belief that the customer is being financially exploited. Rule 3260 addresses the creation and maintenance of discretionary accounts and requires firms to have procedures to identify and prevent excessive trading or "churning" in such accounts. Rule 3260 is intended to protect customers from the misuse of discretionary power by firms and associated persons.

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<sup>66</sup> See File No. SR-FINRA-2016-039.

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

#### Outreach and Collaboration

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

- Carrying out a multi-faceted investor protection campaign through the FINRA Foundation aimed at promoting awareness about, and support for, the prevention of financial fraud and exploitation, while simultaneously empowering financial consumers to protect themselves and their loved ones, using tactics including:
  - Training law enforcement and victim advocates to detect, investigate, and assist consumers with concerns of financial fraud and exploitation in collaboration with federal and state securities regulators, APS groups, NAPSA, the National Center for Victims of Crime, the National White Collar Crime Center, and staff from FINRA's National Cause and Financial Crimes Detection Programs;
  - Engaging in consumer outreach—often in coordination with the SEC, CFPB, state securities regulators, and nonprofits such as AARP and Better Business Bureaus—to empower financial consumers to spot, avoid, and report financial fraud;

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See SEC Staff Bulletin.

- Conducting, supporting, and disseminating research focused on financial exploitation and fraud as well as aging and financial decision-making, which is shared with internal and external stakeholders;<sup>68</sup>
- Collaborating with Committees and Task Forces focused on issues of financial fraud and exploitation, including working with the Department of Justice’s Elder Justice Initiative, serving on NAPSA’s Financial Exploitation Advisory Board, serving on NASAA’s Senior Issues and Diminished Capacity Committee Advisory Council, participating on various multi-disciplinary teams (MDTs) aimed at protecting and assisting vulnerable adults, and holding joint trainings with the CFPB’s Office of Older Americans, and meeting periodically with state securities regulators and states’ attorneys general to discuss senior investor protection issues;<sup>69</sup>
- Issuing alerts and articles that educate investors about important issues and highlighting risks facing senior investors;<sup>70</sup>
- Launching the dedicated FINRA Securities Helpline for Seniors®—available at (844) 57-HELPS—to provide senior investors and their family members with a

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<sup>68</sup> See FINRA Investor Education Foundation Investor Protection Campaign Research, available at [www.finrafoundation.org/fraudresearch](http://www.finrafoundation.org/fraudresearch).

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

<sup>70</sup> See, e.g., articles such as Protecting Seniors from Financial Exploitation and Don’t Give in to Power of Attorney Pressure; Investor Alerts such as Power of Attorney and Your Investments–10 Tips, Plan for Transition: What You Should Know About the Transfer of Brokerage Account Assets on Death, and Seniors Beware: What You Should Know About Life Settlements; and FINRA’s Retirement webpage for investors.

supportive place to get assistance from specially trained FINRA staff related to concerns they have with their brokerage accounts and investments;

- Collaborating with NASAA and the SEC to address senior investor protection, including issuing a Senior Safe Act Fact Sheet designed to raise awareness among member firms, investment advisers and transfer agents about the Act and its immunity provisions;<sup>71</sup>
- Producing and presenting on in-person and virtual panels addressing senior investor protection with the SEC, state securities regulators, NASAA, APS offices, NAPSA, FBI and other agencies; and
- Meeting with adult protective services staff in multiple states, in part through NAPSA, to increase coordination of senior investor protection efforts and highlight FINRA Rule 2165's provision that APS can direct a member firm to terminate or extend a temporary hold authorized by the Rule.

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

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

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

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

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See [http://www.finra.org/sites/default/files/senior\\_safe\\_act\\_factsheet.pdf](http://www.finra.org/sites/default/files/senior_safe_act_factsheet.pdf).

IV. Solicitation of Comments

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

Electronic Comments:

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

Paper Comments:

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

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

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

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

Jill M. Peterson  
Assistant Secretary

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<sup>72</sup> 17 CFR 200.30-3(a)(12).

# Regulatory Notice

20-34

## Senior Investors

### Proposed Amendments to FINRA Rule 2165 and Retrospective Rule Review Report

Comment Period Expires: December 4, 2020

#### Summary

The protection of senior investors is a top priority for FINRA. In August 2019, FINRA launched a retrospective review to assess the effectiveness and efficiency of its rules and administrative processes that help protect senior investors from financial exploitation. The review indicated that FINRA's steps to protect seniors have provided helpful and effective tools in the fight against financial exploitation, but it also suggested some additional tools, guidance and rule changes.

Based on feedback received during the review, FINRA is proposing amendments to Rule 2165 (Financial Exploitation of Specified Adults) to extend the hold period and to allow temporary holds on securities transactions to further address suspected financial exploitation of senior investors. This *Notice* seeks comment on the proposed amendments to Rule 2165. This *Notice* also summarizes the retrospective rule review process, including the predominant themes that emerged from stakeholder feedback and resulting actions, and provides guidance to aid member firms and senior investors.

The proposed rule text is available in Attachment A.

Questions regarding this *Notice* should be directed to:

- ▶ James S. Wrona, Vice President and Associate General Counsel, Office of General Counsel (OGC), at (202) 728-8270; or
- ▶ Jeanette Wingler, Associate General Counsel, OGC, at (202) 728-8013.

Questions concerning the Economic Impact Assessment in this *Notice* should be directed to:

- ▶ Lori Walsh, Deputy Chief Economist, Office of the Chief Economist (OCE), at (202) 728-8323; or
- ▶ Dror Y. Kenett, Economist, OCE, at (202) 728-8208.

October 5, 2020

#### Notice Type

- ▶ Request for Comment

#### Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Operations
- ▶ Registered Representatives
- ▶ Senior Management

#### Key Topics

- ▶ Customer Accounts
- ▶ Financial Exploitation of Seniors
- ▶ Reporting
- ▶ Senior Investors
- ▶ Temporary Holds
- ▶ Trusted Contact Persons

#### Referenced Rules & Notices

- ▶ FINRA Rule 2010
- ▶ FINRA Rule 2150
- ▶ FINRA Rule 2165
- ▶ FINRA Rule 3240
- ▶ FINRA Rule 4512
- ▶ FINRA Rule 4530
- ▶ FINRA Rule 11870
- ▶ Regulatory Notice 07-43
- ▶ Regulatory Notice 08-27
- ▶ Regulatory Notice 11-52
- ▶ Regulatory Notice 12-03
- ▶ Regulatory Notice 19-27

## Action Requested

FINRA encourages all interested parties to comment. Comments must be received by December 4, 2020.

Comments must be submitted through one of the following methods:

- ▶ Online using FINRA's comment form for this *Notice*;
- ▶ Emailing comments to [pubcom@finra.org](mailto:pubcom@finra.org); or
- ▶ Mailing comments in hard copy to:

Jennifer Piorko Mitchell  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

To help FINRA process comments more efficiently, persons should use only one method to comment.

**Important Notes:** Comments received in response to *Regulatory Notices* will be made available to the public on the FINRA website. In general, comments will be posted as they are received.<sup>1</sup>

Before becoming effective, the proposed rule change must be filed with the Securities and Exchange Commission (SEC or Commission) pursuant to Section 19(b) of the Securities Exchange Act of 1934 (SEA or Exchange Act).<sup>2</sup>

## Background & Discussion

### Retrospective Review Process

The retrospective review process has two phases: the assessment phase and the action phase. During the assessment phase, FINRA evaluates whether the rule or rule set is meeting its investor protection objectives by reasonably efficient means. The subsequent action phase implements any recommendations arising from the assessment. However, not every assessment results in a rule change. The assessment may conclude that the rule or rule set remains relevant and appropriately tailored to meet its objectives. In this instance, FINRA was focused on the rules and administrative processes that help protect senior investors from financial exploitation.

To conduct this assessment, FINRA first sought comment in [Regulatory Notice 19-27](#) (August 2019). FINRA expressly sought comment on several questions with respect to addressing financial exploitation and other circumstances of financial vulnerability for senior investors. FINRA received 22 comment letters.<sup>3</sup>

In addition, FINRA obtained input from several advisory committees comprising member firms of different sizes and business models, investor protection advocates, member firms and trade associations. FINRA also obtained the perspective of its operating departments that touch the rules and their administration. Moreover, FINRA considered examination observations and findings involving senior issues. In this regard, FINRA previously had identified as an examination priority reviewing member firms' controls regarding FINRA Rule 2165 (Financial Exploitation of Specified Adults), to the extent firms anticipated placing temporary holds on disbursements pursuant to the rule's safe harbor, and the trusted contact-related amendments to Rule 4512 (Customer Account Information).<sup>4</sup> As part of these reviews, FINRA looked at whether firms had clearly defined policies and procedures, and sought information about firms' early experiences with these provisions.<sup>5</sup>

Finally, FINRA developed an anonymous survey that was distributed to all member firms in the first quarter of 2020. The purpose of the survey was to collect information in order to validate the feedback FINRA received and to provide an additional opportunity for all members to provide their views.<sup>6</sup> There were 238 firms that responded to the survey, and the breakdown of these firm survey respondents according to firm size, as measured by the number of registered representatives, is provided in Table 1 below.

Firm Size	# RRs	Industry		Survey Respondents	
		Count	% Total	Count	% Total
Small	1 - 150	3,153	90%	141	59%
Mid-Size	151 - 499	198	5%	12	5%
Large	500+	168	5%	24	10%
Unknown	0	0	0%	61	26%
<b>Total</b>		<b>3,519</b>	<b>100%</b>	<b>238</b>	<b>100%</b>

*Table 1: The table compares the number and percentage of firms that responded to the survey, by firm size as measured by the number of registered representatives with the total number and percentage of firms within those size categories across the industry. Survey respondents that did not provide information on the number of registered representatives in their firms were classified into the "Unknown" category.*

### Proposed Amendments to Rule 2165

Rule 2165 is the first uniform national standard for placing temporary holds on disbursements to address suspected financial exploitation.<sup>7</sup> Rule 2165 permits a member firm to place a temporary hold on a disbursement of funds or securities from the account of a “specified adult”<sup>8</sup> customer when the firm reasonably believes that financial exploitation of that adult has occurred, is occurring, has been attempted or will be attempted. Prior to the adoption of Rule 2165, some member firms expressed concern that placing a temporary hold on suspicious disbursements was not explicitly permitted by FINRA rules. To address these concerns, Rule 2165 provides member firms and their associated persons with a safe harbor from FINRA Rules 2010 (Standards of Commercial Honor and Principles of Trade), 2150 (Improper Use of Customers’ Securities or Funds; Prohibition Against Guarantees and Sharing in Accounts) and 11870 (Customer Account Transfer Contracts) when member firms exercise discretion in placing temporary holds on disbursements of funds or securities from the accounts of specified adults consistent with the requirements of Rule 2165.

Rule 2165 also includes important safeguards for customers to help ensure that there is not a misapplication of the rule, such as the requirements that: (1) a member firm provide notification of the hold and the reason for the hold to all parties authorized to transact business on the account, including the customer and the customer’s trusted contact person, no later than two business days after the date that the member first placed the hold;<sup>9</sup> (2) a member firm relying on the rule develop and document training policies or programs reasonably designed to ensure that associated persons comply with the requirements of the rule;<sup>10</sup> and (3) any request for a hold be escalated to a supervisor, compliance department or legal department rather than allowing an associated person handling an account to independently place a hold. Importantly, a temporary hold pursuant to Rule 2165 may be placed on a particular suspicious disbursement(s) but not on non-suspicious disbursements (*e.g.*, a regular mortgage payment). Although FINRA encourages members to take advantage of the Rule 2165 safe harbor where there is a reasonable belief of financial exploitation, FINRA would pursue disciplinary action against a firm that uses Rule 2165 for inappropriate purposes (*e.g.*, where a firm improperly holds a disbursement simply to prevent a customer from transferring assets to another firm rather than to prevent financial exploitation).

Temporary holds on disbursements have played a critical role in providing member firms a way to quickly respond to suspicions of financial exploitation before potentially ruinous losses occur for the customer. For example, FINRA’s report for the five-year anniversary of the FINRA Securities Helpline for Seniors® (Helpline)<sup>11</sup> highlights several matters that illustrate the positive impact of placing temporary holds on disbursements to address financial exploitation. The matters include temporary holds placed by member firms to prevent senior investors from losing:

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

The retrospective review indicated that Rule 2165 has been an effective tool in the fight against financial exploitation,<sup>12</sup> but supported amendments to extend the hold period and to allow temporary holds on transactions to further address suspected financial exploitation of senior investors.

#### Hold Period

Rule 2165 allows a member firm to place a temporary hold on a specified adult customer's account for up to 25 business days if the criteria in the rule are satisfied. The rule also provides that this period may be terminated or extended by a state agency or a court of competent jurisdiction. Stakeholders generally supported extending the current 25-business day hold period to provide member firms with a longer period to resolve matters. Stakeholders indicated that the current period may not be sufficient when a matter is under consideration by a state agency or court. This view was shared by NAPSA and the Philadelphia Financial Exploitation Task Force, which both stated that adult protective services (APS) agencies, state regulators and law enforcement typically need more time to conduct thorough investigations. In contrast, NASAA supported retaining the current 25-business day period, which aligns with the hold period provided in the [NASAA Model Act to Protect Vulnerable Adults from Financial Exploitation](#) (NASAA Model Act).

During exams in 2019 focusing on Rule 2165, member firms expressed to FINRA the need for additional time to conduct investigations and resolve matters.<sup>13</sup> Member firms were asked in the survey distributed to member firms about possible impediments to resolving a matter within the current 25-business day hold period provided by Rule 2165. Approximately 53 percent of survey respondents stated that they had been unable to resolve a matter within the 25-business day period. The most common reason was that the matter was under consideration by a state agency (such as APS) or a court. Other common reasons included: (1) the customer did not respond to inquiries from the firm; or (2) the customer did not believe that he or she was being financially exploited. For matters that took longer to resolve than the 25-business day period, approximately 35 percent of survey respondents indicated that it took on average 26 – 50 days to resolve the matter and approximately 59 percent of survey respondents indicated that it took on average 51 – 100 days to resolve the matter.

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

To provide member firms with additional time to resolve matters and for APS agencies, state regulators and law enforcement to conduct thorough investigations, FINRA is proposing amending Rule 2165 to permit extending a temporary hold for an additional 30 business days if the member firm had reported the matter to a state agency or a court of competent jurisdiction.<sup>14</sup>

#### **Transactions in Securities**

While placing a hold pursuant to Rule 2165 stops funds or securities from leaving a customer's account, the rule currently does not apply to transactions in securities.<sup>15</sup> Several external stakeholders recommended extending Rule 2165 to permit a member firm to place a temporary hold on a transaction in securities when the firm has a reasonable belief that the customer is being financially exploited. Even if a firm places a temporary hold on a disbursement out of the customer's account, these stakeholders noted that executing a related transaction may result in significant financial consequences for the customer (*e.g.*, tax consequences, surrender charges, the inability to regain access to a sold investment that has been closed to new investors).

Currently, there are 31 states with laws that allow investment advisers or broker-dealers to place some form of hold. Several stakeholders noted that while the NASAA Model Act does not extend to transactions, 16 of those 31 states (with approximately half of the U.S. population) have enacted laws permitting investment advisers and broker-dealers to place temporary holds on disbursements **and** transactions<sup>16</sup> and that many member firms also use customer agreements that permit placing holds on transactions and disbursements.

During exams in 2019 focusing on Rule 2165, FINRA observed that some member firms included in their customer agreements the ability to place holds on transactions in securities, as well as disbursements of funds or securities, when financial exploitation is suspected. Approximately 25 percent of survey respondents indicated that their customer agreements currently permit placing temporary holds on transactions when financial exploitation is suspected.

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

FINRA recognizes that placing a temporary hold on a transaction is a serious step for a member and the affected customer. But FINRA also recognizes that placing a temporary hold on the underlying transaction may prevent significant negative financial consequences for the customer. These negative financial consequences can result even if a firm places a temporary hold on any related disbursement of funds out of the customer's account. Moreover, the rule would include safeguards to protect customers and avoid misapplication of the rule, such as 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>17</sup>

#### **Economic Impact of the Proposal**

FINRA has undertaken an economic impact assessment, as set forth below, to further analyze the regulatory need for the proposed rule change, its potential economic impacts, including anticipated costs, benefits, and distributional and competitive effects relative to the current baseline, and the alternatives FINRA considered in assessing how best to meet its regulatory objective.

##### *Regulatory Need*

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

##### *Economic Baseline*

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

FINRA also distributed a survey to all member firms in the first quarter of 2020, to which a subset of firms, ranging from small to large firms, responded. The purpose of the survey was to collect information and to provide member firms an additional opportunity to provide their views. The economic baseline, regarding the current application of the rule by firms and the effectiveness and efficiency of the rule is established using the information obtained during the assessment phase.

As noted above, with respect to the use of Rule 2165 in placing a temporary hold on disbursements, of the member firms that indicated having placed a temporary hold,<sup>18</sup> approximately 53 percent of survey respondents stated that the firm had been unable to resolve the matter within the 25-business day period provided by the rule. For firms responding that any matter took longer to resolve than the 25-business day period, approximately 35 percent indicated that it took on average 26 – 50 days to resolve the matter and approximately 59 percent indicated that it took on average 51 – 100 days to resolve the matter.

With respect to the issue of placing a temporary hold on transactions, approximately 25 percent of firm respondents to the survey indicated that their customer agreements currently permit placing temporary holds on transactions. Of these, 22 firms reported that they had placed a temporary hold pursuant to the customer agreement.<sup>19</sup> The majority of these 22 firms have done so no more than 10 times a year, on average. In addition, currently 16 states (with approximately half of the U.S. population) have enacted laws permitting investment advisers and broker-dealers to place temporary holds on disbursements **and** transactions.

#### *Economic Impacts*

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

The proposed amendments to Rule 2165 would permit extending a temporary hold for an additional 30 business days if the member firm had reported the matter to a state agency or a court of competent jurisdiction. FINRA believes that allowing for an extension to the temporary hold period would allow for additional time for firms to resolve matters and for APS agencies, state regulators and law enforcement to conduct thorough investigations of suspected financial exploitation. Moreover, extensions may allow for greater collaboration and interaction with other authorities or regulators on a local, state or national level. Customers would benefit from this extension in instances where the additional time allows for a positive identification of financial exploitation and retention of the disbursement

amount within the account. Alternatively, if the additional time leads to a determination that no financial exploitation occurred, customers may incur costs from the extended delay in access to the funds.

The proposed amendments would also extend Rule 2165 to permit a member firm to place a temporary hold on a transaction in securities when the firm has a reasonable belief that the customer is being financially exploited. Sixteen states, together containing approximately half of the US population, already permit firms to place temporary holds on transactions. Thus, the proposed amendments would impact firms not located in a state that already permits it but that decide to take advantage of the proposed extension of Rule 2165 holds to transactions.<sup>20</sup> The proposed amendments would also impact the customers of those firms. In instances when a firm's hold on a transaction prevented financial exploitation, the customer whose transaction was held would benefit from not incurring the negative financial consequences of the transaction. In instances when a transaction hold was placed and no financial exploitation was found, the economic impact of the hold stems primarily from the magnitude of the security's price movement (positive or negative) between the time the hold was placed and the time it was lifted.

#### *Alternatives Considered*

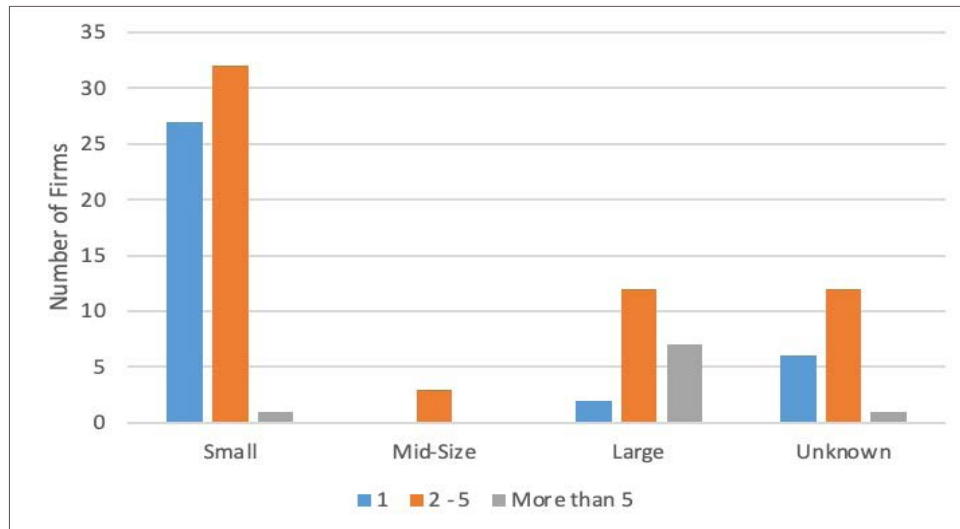
FINRA considered various alternatives to the proposed rule amendments. First, FINRA considered proposing different hold period extensions, ranging from no extension to an extension of up to 75 business days. FINRA also considered not extending Rule 2165 to transactions, but rather keeping the temporary hold option only for disbursements. Ultimately, FINRA has found the proposed amendments to strike an appropriate balance between regulatory burden, investor protection and investor choice.

### **Other Key Themes From the Assessment**

#### *Addressing Financial Exploitation*

Stakeholders indicated the prevalence of and problems associated with financial exploitation of senior investors, including longstanding harm to customers. Several commenters to *Regulatory Notice 19-27* stated that the Helpline,<sup>21</sup> educational materials prepared and distributed by FINRA, Rule 2165 and the trusted contact amendments to Rule 4512 have been helpful and effective tools in the fight against financial exploitation.

The retrospective review indicated that some member firms have a dedicated person or team to handle senior investor issues. Based on information collected in the survey, these member firms most commonly dedicated two to five firm staff to handling senior investor issues (see Figure 1 for breakdown by firm size).



*Figure 1: Number of firms with full time equivalent (FTE) staff dedicated to senior investor issues, with 1 FTE, 2 – 5 FTE, and more than 5 FTE, broken down by firm size. Approximately half of respondents indicated a dedicated staff of 2 – 5 FTE. Of the 238 firms that responded to the survey, only 105 firms answered yes to whether they have staff dedicated to senior investor issues, and of those 103 firms provided the information regarding number of FTE.*

#### **Rule 2165 Notification Period**

Rule 2165 requires the member to provide notification of the hold and the reason for the hold to the trusted contact person and all parties authorized to transact business on the account, including, but not limited to, the customer, no later than two business days after the date that the member first placed the hold.<sup>22</sup> Some external stakeholders suggested flexibility around the two-day notification period to the trusted contact person when the member firm needs time to investigate whether the trusted contact person may be involved in the exploitation. In response, in March 2020, FINRA published a set of frequently asked questions (FAQ) providing that a member firm may refrain from providing notification to an authorized party or the trusted contact person if the firm reasonably suspects that the authorized party or trusted contact person, respectively, may be engaged in the financial exploitation but needs additional time to conduct an investigation. If the member firm's subsequent investigation indicates that the authorized party or trusted contact person is not engaged in the financial exploitation, the FAQ states that the member firm should provide the notification to the authorized party or the trusted contact person, respectively.<sup>23</sup>

### **Cognitive Decline or Diminished Capacity**

Some stakeholders supported extending Rule 2165 to situations where a firm has a reasonable belief that the customer has an impairment, such as diminished capacity, that renders the individual unable to protect his or her own interests, even though there is no evidence of financial exploitation. However, other stakeholders expressed concerns that member firms are not well-positioned to determine if a customer is suffering from cognitive decline or diminished capacity in the absence of suspected financial exploitation. In addition, the Cornell Clinic, NASAA, PIABA and Pittsburgh Clinic expressed concerns that such an extension would give member firms too much discretion or would unfairly impede customer autonomy.

FINRA is not proposing to extend Rule 2165 to situations where a member firm has a reasonable belief that the customer has cognitive decline or diminished capacity but there is no evidence of financial exploitation. Rather than rulemaking, FINRA is summarizing the information obtained about member firms' procedures and practices in this area in this *Notice* to assist other member firms and investors.

FINRA included questions in the survey to member firms to better understand member firms' procedures and practices regarding addressing suspected customer cognitive decline or diminished capacity. Approximately 52 percent reported having specific procedures in this area, including procedures related to:

- ▶ training to identify red flags of customer cognitive decline or diminished capacity;
- ▶ the use of targeted, successful methods to obtain information on a trusted contact person, discussed in more detail below;
- ▶ documenting and escalating suspected customer cognitive decline or diminished capacity to a specific person, office or team for review and response;
- ▶ contacting a trusted contact person or another authorized party;
- ▶ suggesting that the customer be seen by a medical professional;
- ▶ additional supervision of related customer accounts; and
- ▶ reporting matters to APS or law enforcement.

Some member firms also indicated that their customer agreements provide that the firm may place a temporary hold on transactions in securities or disbursements of funds or securities when the firm suspects a customer is suffering from cognitive decline or diminished capacity.

Red flags of diminished capacity or cognitive decline, may include:

- ▶ confusion;
- ▶ memory loss;
- ▶ disorientation with surroundings or during social interactions;
- ▶ difficulty speaking or communicating;
- ▶ poor judgment or the inability to appreciate the consequences of decisions;
- ▶ sudden and unexplained changes to risk tolerance or investment methodology, including increased risk taking;
- ▶ difficulty contacting the customer;
- ▶ repeated calls or requests for the same information;
- ▶ uncharacteristic changes in appearance, demeanor or behavior; or
- ▶ drastic mood swings or irritability.

#### Reporting Requirements

FINRA Rule 4530 (Reporting Requirements) requires member firms to report specified events to FINRA. For some situations, FINRA has developed problem codes for use in reporting pursuant to FINRA Rule 4530 to provide clarity regarding the reportable event. To date, FINRA has not developed a dedicated problem code for Rule 2165-related reporting. In addition, Form U4 (Uniform Application for Securities Industry Registration or Transfer), which member firms use to register associated persons with FINRA and the appropriate jurisdictions, and Form U5 (Uniform Termination Notice for Securities Industry Registration), which member firms use to terminate the registration of associated persons with FINRA and the appropriate jurisdictions, require disclosing customer complaints that meet specified criteria. Rule 4530 and Forms U4 and U5 have different thresholds and analysis for whether a complaint is reportable. In general, FINRA uses complaints reported pursuant to Rule 4530 for regulatory purposes but does not make these complaints public, while complaints reported pursuant to Forms U4 and U5 are public facing. In addition, while Rule 4530 is a FINRA rule, the SEC, self-regulatory organizations, the states and other governmental jurisdictions use Forms U4 and U5. Any amendments to or guidance on Forms U4 and U5 would be subject to discussion with these users.

Several external stakeholders expressed concern that Rule 2165's safe harbor does not extend to complaints reportable on Forms U4 or U5 or pursuant to Rule 4530 about an associated person whose actions were within the safe harbor and stated that some member firms and associated persons may choose not to place a hold pursuant to Rule 2165 because of concerns about a possible customer complaint. Some of these external stakeholders requested guidance on when a Rule 2165-related complaint would be reportable and supported developing a specific problem code for reporting any Rule 2165-related complaint to FINRA pursuant to FINRA Rule 4530. In contrast, NASAA stated in its comment letter to *Regulatory Notice 19-27* that to the extent that a complaint meets the criteria to be reported on Forms U4 or U5, it should be reported on the uniform forms.<sup>24</sup>

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

Rule 2165's safe harbor does not extend to complaint reporting because, among other things, FINRA rules do not limit a customer's right to submit a complaint about an associated person related to any statute, regulation or rule. However, any complaint would be reportable only if it met the specified criteria for reporting in Forms U4 or U5 or Rule 4530. Moreover, FINRA would consider whether a member or associated person had acted consistent with Rule 2165 when assessing any reported information about a hold.

FINRA does not currently plan to propose guidance regarding when a Rule 2165-related complaint would be reportable or develop a specific problem code for reporting any Rule 2165-related complaint to FINRA pursuant to FINRA Rule 4530. In considering whether a complaint is reportable, member firms should use the existing publicly available guidance. FINRA may reconsider this issue or develop a specified problem code for reporting any Rule 2165-related complaint to FINRA pursuant to FINRA Rule 4530 if complaints are reported in the future and they appear to have a detrimental impact on the protection of seniors and other vulnerable adults.

#### **FINRA Rule 4512**

Rule 4512 requires member firms 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 or when updating account information for a non-institutional account in existence prior to the effective date of the amendments (existing account). 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. Member firms are not prohibited from opening and maintaining an account if a customer fails to identify a trusted contact person provided the member firm makes reasonable efforts to obtain the information.

Stakeholders expressed the benefits of discussions with customers about adding a trusted contact person. For example, Lara May and SIFMA indicated in their comment letters to *Regulatory Notice 19-27* that requesting that customers name trusted contact persons had been an opportunity to engage in beneficial conversations about scams to help insulate customers against financial exploitation. Moreover, external stakeholders expressed the benefit of being able to contact an available trusted contact person in administering a customer's account (*e.g.*, where customers had recently changed phone numbers or moved without updating their contact information; where customers were on extended trips; and where firms had concerns over customers' possible diminished capacity even though there was no indication of financial exploitation). External stakeholders also noted that some member firms permit customers to name more than one trusted contact person and that this may be helpful, for example, where a customer would like to name multiple children as trusted contact persons.

If a customer has not named a trusted contact person or the trusted contact person may be otherwise unavailable, survey respondents indicated that they have reached out to another authorized party, such as a joint accountholder, power of attorney, legal counsel or accountant. Survey respondents also reported that they may ask the customer if another party (*e.g.*, a spouse or adult child) can attend meetings discussing the customer's account.

#### *Methods*

Because external stakeholders expressed concern with customer response rates, FINRA sought information in the survey to member firms on percentages of existing and new customers and who had provided information for a trusted person contact as of the first quarter of 2020. Most survey respondents indicated that 25 percent or less of the firm's existing or new customers had provided trusted contact information. In addition, member firms were asked about methods they used to seek the name and contact information for a trusted contact person and customer response rates. Survey respondents indicated that they had the best response rates when seeking the trusted contact person information:

- ▶ in the account opening agreement;
- ▶ during one-on-one conversations between a financial professional and the customer; and
- ▶ with a prompt when the customer calls.

Member firms may find it helpful to incorporate these methods as part of seeking the name and contact information for a trusted contact person.

### *Customer Education*

External stakeholders also shared that some customers incorrectly believe that naming a trusted contact person would give that person authority over the customer's account. Because many people believe that they could never be the victim of financial exploitation, internal and external stakeholders also suggested highlighting that the trusted contact person can be used in a broader range of situations pursuant to Rule 4512 (*e.g.*, if the member firm has been unable to contact the customer after multiple attempts). To that end, SEC's Office of Investor Education and Advocacy and FINRA collaborated on an Investor Bulletin that helps customers understand the purpose of designating a trusted contact person for brokerage accounts, and encourages customers to designate a trusted contact person. The Investor Bulletin was published in March 2020 and is available on the SEC's [website](#) and on FINRA's [website](#). Member firms may find it helpful to use in communicating with customers. In addition, in April 2018, FINRA published a [similar article](#) providing information on the trusted contact person-related amendments to Rule 4512 and Rule 2165 for investors and member firms and made a [downloadable print version](#) available.

### **Sanction Guidelines**

Internal and external stakeholders supported amending FINRA's *Sanction Guidelines* to include as a principal consideration when assessing appropriate sanctions the customer's age or physical or mental impairments. The National Adjudicatory Council (NAC) approved amendments to the Principal Considerations in Determining Sanction section of the *Sanction Guidelines* to expressly contemplate the customer's age or physical or mental impairment that renders the individual unable to protect his or her own interests. These amendments to the *Sanction Guidelines* and the effective date will be discussed in greater detail in a separate *Regulatory Notice*.

### **Marketing of Products and Strategies to Senior Investors**

Some stakeholders supported heightened supervision for the marketing and sale of complex products and strategies to senior investors but expressed skepticism about the value of requiring additional disclosure for these products and strategies. Approximately 51 percent of survey respondents indicated having specific procedures related to marketing securities products and strategies to seniors, including, for example:

- ▶ events, such as lunches, geared to senior investors;
- ▶ use of senior-related designations by registered persons; and
- ▶ heightened review by a firm's compliance department of any marketing to senior investors.<sup>25</sup>

Furthermore, approximately 16 percent of these firms reported providing additional disclosure to senior investors regarding:

- ▶ annuities;
- ▶ alternative products; and
- ▶ products as required by some states.

FINRA has previously published guidance:

- ▶ in [Regulatory Notice 12-03](#) (January 2012) on the supervision of complex products by member firms;
- ▶ in [Regulatory Notice 11-52](#) (November 2011) regarding the supervision of registered persons using senior designations;
- ▶ in [Regulatory Notice 08-27](#) (May 2008) regarding supervising registered representatives' use of marketing materials to establish expertise; and
- ▶ in [Regulatory Notice 07-43](#) (September 2007) on member firms' obligations relating to senior investors, including best practices in making recommendations and in communicating with senior investors.

FINRA reminds member firms of this prior guidance and its applicability to the marketing and sale of complex products and strategies to senior investors.

#### **Customer Disputes**

PIABA urged FINRA to emphasize to arbitrators the importance of expeditiously resolving disputes involving senior investors. FINRA Dispute Resolution Services has provided guidance on expedited proceedings for senior or seriously ill investors.<sup>26</sup>

#### **Information Sharing**

External stakeholders requested guidance on the ability of a member firm to share information with another financial institution when it believes that a customer is the victim of financial exploitation. In response, in March 2020, FINRA published a new FAQ noting that, in many instances, a member would be permitted to disclose information to another financial institution related to suspected financial exploitation.<sup>27</sup> The FAQ states that: (1) Regulation S-P allows a member to share nonpublic personal information with non-affiliated third parties for certain purposes, including to protect against or prevent actual or potential fraud, unauthorized transactions, claims, or other liability;<sup>28</sup> and (2) Section 314(b) of the USA PATRIOT Act permits a financial institution, upon providing notice to the United States Department of the Treasury, to share information with other financial institutions in order to identify and report to the federal government activities that may involve money laundering or terrorist activity.<sup>29</sup>

### Outreach and Collaboration

Stakeholders recommended that FINRA continue to partner with stakeholders such as the SEC, state securities regulators, state and county APS and senior-focused associations to address financial exploitation and to improve understanding of the FINRA rules in this area. FINRA has and will continue to prioritize senior investors and address financial exploitation of senior investors, including through:

- ▶ carrying out a multi-faceted investor protection campaign through the FINRA Foundation aimed at promoting awareness about, and support for, the prevention of financial fraud while simultaneously empowering financial consumers to protect themselves, using such tactics as:
  - ▶ fraud prevention and victim advocate training in collaboration with federal and state securities regulators, APS groups, NAPSA, the National Center for Victims of Crime, the National White Collar Crime Center, and staff from FINRA's National Cause and Financial Crimes Detection Programs;
  - ▶ engaging in outreach—often in coordination with the SEC, state securities regulators, and nonprofits such as AARP and the Better Business Bureau—to empower financial consumers to spot, avoid, and report financial fraud;
  - ▶ conducting and supporting research focused on financial exploitation and fraud as well as aging and financial decision-making, which is shared with internal and external stakeholders;<sup>30</sup>
- ▶ issuing alerts and articles educating investors about important issues and highlighting risks facing senior investors;<sup>31</sup>
- ▶ launching the dedicated Helpline—available at (844) 57-HELPS—to provide senior investors and their family members with a supportive place to get assistance from specially trained FINRA staff related to concerns they have with their brokerage accounts and investments; and
- ▶ collaborating with NASAA and the SEC to address senior investor protection, including issuing a Senior Safe Act Fact Sheet designed to raise awareness among member firms, investment advisers and transfer agents about the act and its immunity provisions.<sup>32</sup>

### FINRA Rule 3240 (Borrowing From or Lending to Customers)

The retrospective review also sought stakeholders' input on the effectiveness of Rule 3240. FINRA will summarize those views and any proposed amendments to the rule, guidance or other actions resulting from the findings in a separate *Regulatory Notice*.

## Request for Comments on Proposed Amendments to Rule 2165

FINRA requests comment on all aspects of the proposed amendments to Rule 2165. FINRA requests that commenters provide empirical data or other factual support for their comments wherever possible. FINRA specifically requests comment concerning the following issues:

1. What are the alternative approaches, other than the proposed amendments to Rule 2165, that FINRA should consider?
2. Should Rule 2165's safe harbor be extended to apply to transactions in securities, in addition to disbursements of funds and securities? What are the implications of extending the safe harbor to transactions?
3. Should Rule 2165's temporary hold period be extended as proposed?
4. Has your firm identified any unintended consequences when placing or attempting to place a temporary hold on disbursement of funds or securities from an account under Rule 2165?
5. Are there any material economic impacts, including costs and benefits, to investors, issuers and firms that are associated specifically with the proposal? If so:
  - a. What are these economic impacts and what are their primary sources?
  - b. To what extent would these economic impacts differ by business attributes, such as size of firm or differences in business models?
  - c. What would be the magnitude of these impacts, including costs and benefits?
6. Are there any expected economic impacts associated with the proposal not discussed in this *Notice*? What are they and what are the estimates of those impacts?

## Endnotes

1. Parties should submit in their comments only personally identifiable information, such as phone numbers and addresses, that they wish to make available publicly. FINRA, however, reserves the right to redact, remove or decline to post comments that are inappropriate for publication, such as vulgar, abusive or potentially fraudulent comment letters. FINRA also reserves the right to redact or edit personally identifiable information from comment submissions.
2. See SEA Section 19 and rules thereunder. After a proposed rule change is filed with the SEC, the proposed rule change generally is published for public comment in the Federal Register. Certain limited types of proposed rule changes take effect upon filing with the SEC. See SEA Section 19(b)(3) and SEA Rule 19b-4.
3. The comment letters were from: anonymous (February 26, 2020); Eric Arnold, Clifford Kirsch and Holly Smith of Eversheds Sutherland on behalf of the Committee of Annuity Insurers (October 8, 2019) (CAI); Seth A. Miller, General Counsel, Executive Vice President, and Chief Risk Officer, Cambridge Investment Research, Inc. (October 8, 2019) (Cambridge); William A. Jacobson, Esq., Clinical Professor of Law and Director, and Nicole A. Jaeckel, Securities Law Clinic Cornell Law School (October 7, 2019) (Cornell Clinic); Christopher Bok, Director, Financial Information Forum (October 8, 2019) (FIF); Marc Fitapelli, Esq., Fitapelli Kurta (October 8, 2019) (Fitapelli Kurta); Robin M. Traxler, Senior Vice President, Policy & Deputy General Counsel, Financial Services Institute (October 8, 2019) (FSI); Jennifer L. Szaro, Lara May & Associates, LLC, and Robert L. Hamman, President, First Asset Financial Inc. (October 4, 2019) (Lara May); Maureen K. Paparo, Lincoln Square Legal Services (October 8, 2019) (Lincoln Square); Megan Valent and Teresa J. Verges, University of Miami School of Law (October 1, 2019) (Miami Investor Rights Clinic); Courtney Rogers Reid, Lead Counsel, Broker-Dealer and Investment Adviser Practice Group, MML Investors Services, LLC (October 8, 2019) (MMLIS); Kathleen Quinn, Board President, National Adult Protective Services Association (October 8, 2019) (NAPSA); Christine Lazaro, President, and Samuel B. Edwards, Executive Vice President, Public Investors Advocate Bar Association (October 8, 2019) (PIABA); Christopher Gerold, President, North American Securities Administrators Association (October 8, 2019) (NASAA); Nancy Brown, President and Co-Chair, and Dian VanderWell, Opportunity Alliance Nevada (October 8, 2019) (Opportunity Alliance Nevada); Joe Snyder, Chair, Philadelphia Financial Exploitation Task Force (October 7, 2019) (Philadelphia Financial Exploitation Task Force); Alice L. Stewart, Director, University of Pittsburgh School of Law – Securities Arbitration Clinic (October 8, 2019) (Pittsburgh Clinic); Erin K. Lineham, Associate General Counsel – Compliance, Raymond James & Associates, Inc. (October 29, 2019) (Raymond James); Lisa J. Bleier, Managing Director, Securities Industry and Financial Markets Association (October 8, 2019) (SIFMA); Christine Lazaro, Professor of Clinical Legal Education and Director, St. John's University School of Law Securities Arbitration Clinic (October 8, 2019) (St. John's Clinic); and Ron Long, Head of Elder Client Initiatives Center of Excellence, Wells Fargo & Company (October 8, 2019) (Wells Fargo). In addition, we received a letter dated November 15, 2019, from SIFMA supplementing its original letter.
4. See [2019 Annual Risk Monitoring and Examination Priorities Letter](#) (Jan. 22, 2019).
5. See *id.*

6. Survey respondents were permitted to skip survey questions. Information in this *Notice* regarding the percentage of survey respondents for a particular question reflects the percentage of respondents for that question, not the percentage of respondents for the survey as a whole. Approximately 190 responses were received for each top-level (non-nested) question. Therefore, unless indicated otherwise, the reader can assume that the percentages are based on approximately 190 responses.
7. See Securities Exchange Act Release No. 79964 (Feb. 3, 2017), 82 FR 10059 (Feb. 9, 2017) (Notice of Filing of Partial Amendment No. 1 and Order Granting Accelerated Approval of File No. SR-FINRA-2016-039) (Approval Order).
8. The definition of “specified adult” in Rule 2165 covers those investors who are particularly susceptible to financial exploitation. A “specified adult” is (A) a natural person age 65 and older or (B) a natural person age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests. See Rule 2165(a)(1). Supplementary Material .03 to Rule 2165 provides that a member’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.
9. See Rule 2165(b)(1)(B).
10. See Supplementary Material .02 to Rule 2165.
11. See [Protecting Senior Investors 2015–2020: An Update on the FINRA Securities Helpline for Seniors, Other FINRA Initiatives and Member Firm Practices](#).
12. During exams in 2019 focusing on Rule 2165, FINRA observed that large firms were more likely than small firms to place temporary holds pursuant to Rule 2165. Some member firms that declined to use the safe harbor cited litigation risks associated with placing temporary holds or in evaluating whether a customer is being financially exploited. This is consistent with our survey responses with large firms indicating that they had placed a temporary hold pursuant to the rule in a significantly larger percentage than mid-size or small firms. Thirty-one survey respondents had placed a temporary hold pursuant to Rule 2165. Eighty-four percent of large firm respondents had placed a hold pursuant to Rule 2165, while only 6 percent of all other sized firms had placed a hold pursuant to Rule 2165.
13. In 2019, FINRA identified as an examination priority: (1) reviewing member firms’ controls regarding their obligations under trusted contact person-related amendments to FINRA Rule 4512 and Rule 2165, to the extent that firms anticipate placing temporary holds on disbursements pursuant to the Rule 2165 safe harbor, including whether firms have clearly defined policies and procedures or practices; and (2) learning about firms’ early experiences with these provisions. See [2019 Annual Risk Monitoring and Examination Priorities Letter](#) (Jan. 22, 2019).
14. The 30-business day hold period in proposed Rule 2165(b)(4) would be in addition to the 15-business day hold in Rule 2165(b)(2) and the 10-business day hold in Rule 2165(b)(3).

15. For example, Rule 2165 currently would not apply to a customer's order to sell his shares of a stock. However, if a customer requested that the proceeds of a sale of shares of a stock be disbursed out of his account at the member firm, then the rule could apply to the disbursement of the proceeds where the customer is a "specified adult" and there is reasonable belief of financial exploitation.
16. As of September 2020, the following states permit holds on disbursement and transactions: Arizona, California, Florida, Kentucky, Minnesota, Mississippi, Missouri, New Jersey, New Mexico, North Dakota, Oklahoma, Texas, Utah, Virginia, Washington State and West Virginia. The Oklahoma provision becomes effective in November 2020.
17. See Rule 2165(c).
18. Thirty-one firms responded in the survey that they had placed a temporary hold. Out of the 31 firms that indicated that they had placed a temporary hold, 17 firms indicated that it took more than the 25-business day period to resolve the matter, as currently provided in Rule 2165.
19. These 22 firms represent approximately half of all firms that reported that their customer agreements permit them to place a temporary hold on transactions in a customer account.
20. When asked in the survey about FINRA extending Rule 2165 to transactions, respondents were evenly split with 50 percent anticipating that the member firm would place holds on transactions pursuant to amended Rule 2165 and 50 percent anticipating that the firm would not place holds.
21. Additional information about the Helpline is available on its dedicated [webpage](#).
22. See 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 Rule 2165.
23. The FAQ was added to the existing [FAQs Regarding FINRA Rules Relating to Financial Exploitation of Senior Investors](#).
24. See [Form U4 and U5 Interpretive Questions and Answers](#) providing guidance on when a complaint is reportable on Forms U4 or U5.
25. Member firms may adopt procedures regarding marketing securities products and strategies to senior investors as part of having a supervisory system reasonably designed to achieve compliance with the securities laws and FINRA rules, such as FINRA Rule 2210 (Communications with the Public).
26. See [Expedited Proceedings for Senior or Seriously Ill Parties](#).
27. The FAQ was added to the existing [FAQs Regarding FINRA Rules Relating to Financial Exploitation of Senior Investors](#).
28. See 17 CFR § 248.15(a)(2)(ii).

29. See 31 CFR § 1010.540 (Voluntary information sharing among financial institutions); the United States Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") SAR Activity Review Issue 23 (Apr. 30, 2013) (providing examples of information sharing among financial institutions pursuant to Section 314(b), including for suspected financial exploitation of a senior); and additional information from FinCEN available at <https://www.fincen.gov/section-314b>. See also 31 CFR § 1023.320(e) (Reports by brokers or dealers in securities of suspicious transactions) regarding the requirement to maintain the confidentiality of suspicious activity reports.
30. See FINRA Investor Education Foundation and Investor Protection Campaign Research.
31. See, e.g., articles such as Protecting Seniors from Financial Exploitation; Investor Alerts such as Power of Attorney and Your Investments—10 Tips, Plan for Transition: What You Should Know About the Transfer of Brokerage Account Assets on Death, and Seniors Beware: What You Should Know About Life Settlements; and FINRA's Retirement webpage for investors.
32. See [http://www.finra.org/sites/default/files/senior\\_safe\\_act\\_factsheet.pdf](http://www.finra.org/sites/default/files/senior_safe_act_factsheet.pdf).

## Attachment A

Below is the text of the proposed rule change. New language is underlined; deletions are in brackets.

\* \* \* \* \*

### 2000. DUTIES AND CONFLICTS

\* \* \* \* \*

### 2100. TRANSACTIONS WITH CUSTOMERS

\* \* \* \* \*

#### 2165. Financial Exploitation of Specified Adults

(a) No Change.

**(b) Temporary Hold on Disbursements or Transactions**

(1) A member may place a temporary hold on a disbursement of funds or securities from the Account of a Specified Adult or a transaction in securities in the Account of a Specified Adult if:

(A) The member reasonably believes that financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted; and

(B) The member, not later than two business days after the date that the member first placed the temporary hold on the disbursement of funds or securities or the transaction in securities, provides notification orally or in writing, which may be electronic, of the temporary hold and the reason for the temporary hold to:

(i) all parties authorized to transact business on the Account, unless a party is unavailable or the member reasonably believes that the party has engaged, is engaged, or will engage in the financial exploitation of the Specified Adult; and

(ii) the Trusted Contact Person(s), unless the Trusted Contact Person is unavailable or the member reasonably believes that the Trusted Contact Person(s) has engaged, is engaged, or will engage in the financial exploitation of the Specified Adult; and

(C) The member immediately initiates an internal review of the facts and circumstances that caused the member to reasonably believe that the financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted.

(2) The temporary hold authorized by this Rule will 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 or the transaction in securities, unless otherwise terminated or extended by a state regulator or agency of competent jurisdiction or a court of competent jurisdiction, or extended pursuant to paragraph (b)(3) of this Rule.

(3) Provided that the member's internal review of the facts and circumstances under paragraph (b)(1)(C) of this Rule supports the member's reasonable belief that the financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted, the temporary hold authorized by this Rule may be extended by the member for no longer than 10 business days following the date authorized by paragraph (b) (2) of this Rule, unless otherwise terminated or extended by a state regulator or agency of competent jurisdiction or a court of competent jurisdiction, or extended pursuant to paragraph (b)(4) of this Rule.

(4) Provided that the member's internal review of the facts and circumstances under paragraph (b)(1)(C) of this Rule supports the member's reasonable belief that the financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted and the member has reported or provided notification of the member's reasonable belief to a state regulator or agency of competent jurisdiction or a court of competent jurisdiction, the temporary hold authorized by this Rule may be extended by the member for no longer than 30 business days following the date authorized by paragraph (b)(3) of this Rule, unless otherwise terminated or extended by a state regulator or agency of competent jurisdiction or a court of competent jurisdiction.

(c) No Change.

**(d) Record Retention**

Members shall retain records related to compliance with this Rule, which shall be readily available to FINRA, upon request. The retained records shall include records of: (1) request(s) for disbursement or transaction that may constitute financial exploitation of a Specified Adult and the resulting temporary hold; (2) the finding of a 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 or transaction; (3) the name and title of the associated person that authorized the temporary hold on a disbursement or transaction; (4) notification(s) to the relevant parties pursuant to paragraph (b)(1)(B) of this Rule; and (5) the internal review of the facts and circumstances pursuant to paragraph (b)(1)(C) of this Rule.

**• • • Supplementary Material: -----**

**.01 Applicability of Rule.** This Rule provides members and their associated persons 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 the Accounts of Specified Adults or transactions in securities in the Accounts of Specified Adults consistent with the requirements of this Rule. This Rule does not require members to place temporary holds on disbursements of funds or securities from the Accounts of Specified Adults or transactions in securities in the Accounts of Specified Adults.

.02 through .03 No Change.

\* \* \* \* \*

Exhibit 2b

**List of Written Comments**  
**Regulatory Notice 20-34**

1. Lisa A. Bleier, Securities Industry and Financial Markets Association (“SIFMA”) (December 4, 2020)
2. Katrina A. Carroll, LPL Financial (“LPL”) (December 4, 2020)
3. Carrie L. Chelko, Fidelity Investments (“Fidelity”) (December 4, 2020)
4. Lori Delagrammatikas, William Benson, Kendra Kuehn and Joe Snyder, National Adult Protective Services Association (“NAPSA”) (December 4, 2020)
5. Fabian Garcia and Sean Hughes, University of Miami School of Law Investment Rights Clinic (“Miami Investor Rights Clinic”) (December 2, 2020)
6. Jesse Hill, Edward Jones (“Edward Jones”) (November 9, 2020)
7. Lisa Hopkins, North American Securities Administrators Association, Inc. (“NASAA”) (December 8, 2020)
8. Clifford Kirsch and Eric Arnold, Eversheds Sutherland (US) LLP for The Committee of Annuity Insurers (“CAI”) (December 4, 2020)
9. Ron Long, Wells Fargo & Company (“Wells Fargo”) (December 3, 2020)
10. Leonida Manabat, (“Manabat”) (December 2, 2020)
11. David P. Meyer, Public Investors Advocate Bar Association (“PIABA”) (December 4, 2020)
12. Emily Micale and John Jennings, Insured Retirement Institute (“IRI”) (December 4, 2020)
13. Seth A. Miller, Cambridge Investment Research, Inc. (“Cambridge”) (December 3, 2020)
14. Heather Murphy, Commonwealth Financial Network (“Commonwealth”) (December 4, 2020)
15. Wendy Norcross, (“Norcross”) (November 11, 2020)

16. Courtney Rogers Reid, MML Investors Services, LLC (“MMLIS”) (December 4, 2020)
17. Joe Snyder, Philadelphia Financial Exploitation Prevention Task Force (“Philadelphia Financial Exploitation Task Force”) (December 4, 2020)
18. Alice L. Stewart and Rachael T. Shaw, University of Pittsburgh Securities Arbitration Clinic (“Pittsburgh Clinic”) (November 25, 2020)
19. Robin Traxler, Financial Services Institute (“FSI”) (December 4, 2020)

Exhibit 2c



December 4, 2020

Submitted via e-mail: [pubcom@finra.org](mailto:pubcom@finra.org)

FINRA  
1735 K Street, NW  
Washington, DC 20006

Re: Regulatory Notice 20-34

To Whom It May Concern:

Thank you for the opportunity to provide feedback on Regulatory Notice 20-34 which proposes amendments to Rule 2165. SIFMA<sup>1</sup> appreciates the continuing work that FINRA has undertaken to protect senior and vulnerable adults from financial exploitation, and we believe Rule 2165 has been helpful in the fight against financial exploitation. We believe these additional amendments proposed will further assist financial institutions in that continued effort.

## **I. We Support the Inclusion of Transactions**

Rule 2165 permits a financial services provider to place a temporary hold on a disbursement of funds from the account when the firm reasonably believes there is financial exploitation. We fully support FINRA's proposal to expand the rule's safe harbor to include temporary holds on transactions in securities. FINRA RN 20-34 notes that a significant number of member firm customer agreements permit placing holds on transactions, and 16 state laws permit broker dealers to place holds on suspicious transactions. FINRA's proposal to now include temporary holds on securities transactions will help protect against financial exploitation relating to purchases or sales, and thus protect senior investors from significant harm.

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<sup>1</sup> SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

It is worth noting that approximately one half of the entire U.S. population already benefits from broader, transaction-based protections under state law.<sup>2,3</sup>

## **II. We Support Extension of the Length of Time for Holds**

Currently, 2165 allows firms to place a temporary hold on a disbursement of funds for up to 25 business days. The rule states that this period may be extended by a state agency or a court. We find that the number of days is often too short for the issues to be resolved, and that it can be difficult to obtain an extension from a state agency or a court. As a result, we support FINRA's proposal extending the period of time an additional 30 days if the firm reported the matter to a state agency or a court of competent jurisdiction.

Firms often work with law enforcement, securities and financial regulators, and – critically – Adult Protective Services to resolve senior financial exploitation. The APS workers need more time to investigate cases of senior financial exploitation, as they are also investigating cases of abuse and neglect. As a result, the National Adult Protective Services Association specifically noted in their letter to FINRA<sup>4</sup> that the 25 day limitation was often not enough time due to understaffing at their offices, along with an increase in reports. Their request was for 60 days plus flexibility to extend, which we support. This extension of time would permit the firm to extend a hold under FINRA's rules to maintain the status quo and allow for more time for greater collaboration with APS, state regulators, and local law enforcement.

## **III. We seek editing clarification to include local APS agencies**

We would suggest an editing correction to the operating language in part (b)(4). Since APS offices could be local or state agencies, we would suggest adding a comma after the phrase “state regulator” and inserting an “an” before agency so that it covers either model. This would result in the following edits:

(4) Provided that the member's internal review of the facts and circumstances under paragraph (b)(1)(C) of this Rule supports the member's reasonable belief that the financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted and the member has reported or

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<sup>2</sup> Based on 2010 Census numbers.

<sup>3</sup> Arizona, California, Florida, Kentucky, Minnesota, Mississippi, Missouri, New Jersey, New Mexico, North Dakota, Oklahoma, Texas, Utah, Virginia, Washington State and West Virginia

<sup>4</sup> [https://www.finra.org/sites/default/files/2019-10/19-27\\_NAPSA\\_comment.pdf](https://www.finra.org/sites/default/files/2019-10/19-27_NAPSA_comment.pdf)

provided notification of the member's reasonable belief to a state regulator, ~~or an~~ agency of competent jurisdiction or a court of competent jurisdiction, the temporary hold authorized by this Rule may be extended by the member for no longer than 30 business days following the date authorized by paragraph (b)(3) of this Rule, unless otherwise terminated or extended by a state regulator, ~~or an~~ agency of competent jurisdiction or a court of competent jurisdiction.

#### **IV. We encourage FINRA to consider relief with regard to Form U-4**

The industry continues to be concerned about bad actors filing malicious complaints against an advisor after a firm places a temporary hold on an account. We urge FINRA to consider developing a specific hold-related problem code and to issue guidance that such hold-related complaints should be reportable against the firm and not be allocated to an individual advisor's Form U-4 – regardless of whether the hold was placed pursuant to Rule 2165, state laws or a firm's client agreement. This is important because an individual advisor does not have the authority to place a temporary hold, and an advisor should not be penalized for actions that the firm takes to protect their senior client – regardless of how the complaint is drafted. This would also prevent bad actors from using the threat of a complaint to try to achieve their malicious goals of taking advantage of vulnerable senior investors.

#### **V. Conclusion**

Thank you for the opportunity to comment. We look forward to discussing these issues further. Please feel free to contact either myself at [Redacted] or Marin Gibson at [Redacted]

Sincerely,

*Lisa Bleier*

Lisa J. Bleier

**Katrina A. Carroll**  
**Chief AML Officer**  
**Executive Vice President**

1055 LPL Way  
Fort Mill, SC 29715

(980) 321-1846

December 4, 2020

Submitted electronically to [pubcom@finra.org](mailto:pubcom@finra.org)

Jennifer Piorko Mitchell  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

Re: FINRA Regulatory Notice 20-34, Proposed Amendments to FINRA Rule 2165 and Retrospective Rule Report

Dear Ms. Mitchell:

LPL Financial LLC (LPL) appreciates the opportunity to provide comments to the Financial Industry Regulatory Authority (FINRA) in response to its request for comments pursuant to Regulatory Notice 20-34 Proposed Amendments to FINRA Rule 2165 and Retrospective Rule Review Report (RN-34).<sup>1</sup> LPL commends FINRA for conducting a retrospective review to assess the effectiveness of its rules and administrative processes and its ongoing efforts to protect senior investors from financial exploitation.

#### **I. Overview of LPL**

LPL is a leading retail investment advisory firm, independent broker-dealer and registered investment advisor (RIA) custodian. We serve more than 17,000 independent financial professionals and over 700 financial institutions by providing them with the technology, research, clearing and compliance services, and practice management programs they need to create and grow thriving practices. LPL enables them to provide objective guidance to millions of American families seeking wealth management, retirement planning, financial planning and asset management solutions.

We believe that objective financial guidance is a fundamental need for everyone. We enable our financial professionals to focus on what they do best, which is to create the personal, long-term relationships that are the foundation for turning life's aspirations into financial realities. LPL and its affiliates have more than 4,300 full-time employees working to ensure that our associated financial professionals have the resources they need.

#### **II. Support for and Implementation of Rule 2165**

LPL has long supported strong measures to protect senior and vulnerable adult investors from fraud. With an estimated one in five Americans over the age of 65 suspected to be a victim of financial

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<sup>1</sup> See Regulatory Notice 20-34, *FINRA Requests Comments on Proposed Amendments to Rule 2165*.

fraud<sup>2</sup> and a rapidly aging population, we believe that the financial services sector should have robust policies and procedures to protect this vulnerable population. Financial professionals typically have long-standing relationships with their senior clients, often working with them first as small savers, through building families and eventually during retirement. Our financial professionals have a unique perspective into the lives and circumstances of their clients, which makes them a key front-line resource for identifying and preventing financial exploitation that could be devastating.

LPL is committed to ensuring that all LPL professionals have the tools and training needed to recognize and report suspected senior and vulnerable adult exploitation. All LPL home office employees are required to take a training course on working with senior investors and vulnerable adults to understand the requirements under FINRA Rule 2165, and to understand that there are a number of different state laws and regulations that also protect senior investors and vulnerable adults.

We also have a dedicated Senior Investor Protection (SIP) team, with four home office employees who investigate suspected senior and vulnerable adult financial exploitation and abuse. Consistent with FINRA Rule 2165, when fraud is suspected and an investigation is opened, only certain individuals within the Compliance, Legal, and Risk department are authorized to assess whether a hold should be placed on disbursement(s). When a hold is placed on a disbursement, the SIP team notifies all appropriate persons authorized to transact business on the account and the trusted contact person of the hold and provides the reasons for the hold. Further, SIP provides guidance and resources to our home office employees to address suspected financial exploitation and other circumstances of financial vulnerability. The SIP team also works extensively with each state's Adult Protective Services (APS), local law enforcement, and regulators.

LPL continues to advocate for enhanced laws and regulations to address this evolving threat and better equip our financial professionals and our firm with tools to protect aging clients. In fact, LPL was one of the first firms to offer its financial professionals SeniorSafe trainings held in coordination with state securities regulators. This program, which was started by the State of Maine, gives banks, credit unions, broker-dealers, and investment advisers the chance to learn more about elder financial abuse and introduces them to the resources necessary to make a report. This is an issue of utmost importance, and LPL looks to continue to work closely with our regulators.

Given our practical experience working to protect senior investors and vulnerable adults, we respectfully submit the below comments on Proposed Amendments to FINRA Rule 2165.

### **III. Proposed Amendments to FINRA Rule 2165**

LPL views this proposal as a positive change and appreciates FINRA's prioritization of addressing financial exploitation of senior investors, including conducting its retrospective review that considers the input of many stakeholders. When adopted in 2017, Rule 2165<sup>3</sup> established a framework to enable member firms to better protect customers, specifically those of an advancing age, from financial exploitation. FINRA acknowledged in RN 20-34 that the proposed changes were driven by feedback from member firms as part of its retrospective review of the rule. We believe that the proposed amendments represent important steps forward in expanding the financial sector's efforts to protect elders from potential financial abuse and exploitation.

#### **Inclusion of "Transactions"**

We are particularly supportive of FINRA's proposal to enable firms to place a hold on "transactions" as well as "disbursements," which are included in the original rule. We view these positive

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<sup>2</sup> According to the Investor Protection Trust Elder Fraud Survey, available at:

<https://www.investorprotection.org/protect-yourself/?fa=protect-seniors> HOW DO I REMOVE PAGE # on first page only?

<sup>3</sup> See Rule 2165. Financial Exploitation of Specified Adults adopted by FINRA and effective February 5, 2018.

changes as additional tools that would strengthen member firms' ability to combat financial fraud targeting seniors. When fraud is suspected on a securities transaction, the ability to place a temporary hold on the account would allow the firm to temporarily pause potentially exploitive sales or liquidation of assets and for the elderly client's market position to be maintained. Should the transaction be completed without a hold, the market position could be compromised and result in unnecessary loss to the client.

Additionally, older and vulnerable adults are unlikely to be able to earn back any of their losses, especially those older adults who have already entered retirement. LPL's current Master Account Agreement,<sup>4</sup> provided to customers at the time of account opening, incorporates the ability to hold transactions, disbursements and account transfers if exploitation of any kind is suspected. We have found that the ability to hold a transaction is a valuable tool for our SIP team when it is investigating potential fraud. We believe that enabling all member firms to use holds on transactions in addition to disbursements will lead to further protection of senior investors and vulnerable adults.

### **Extending the Hold Period**

LPL also strongly supports FINRA's proposal to increase the temporary hold period from 25 days to 55 days. Temporary hold periods are a crucial lever that firms can pull to quickly respond to allegations of financial exploitation before a customer suffers any loss. It is important to note that a hold on one transaction or disbursement in the interim does not preclude the customer from being able to pay standard monthly bills or living expenses.

However, we request that FINRA consider a further extension. According to its retrospective review of Rule 2165, FINRA's survey found that most firms take between 51 and 100 days to complete an investigation. This illustrates that the current hold period of 25 days is not optimal, and even an additional thirty days may not be enough time to complete a thorough investigation. We therefore encourage FINRA to further extend the hold period to at least one hundred days, in keeping with the survey results.

### **Divergence Among Certain State and FINRA Rules**

To date, 31 states have enacted the North American Securities Administrators Association (NASAA) Senior Model Act since it was formally adopted by NASAA members in January 2016. The NASAA Senior Model Act does not include "transactions" in its scope.<sup>5</sup> However, recognizing that holds on transactions can be an additional tool to further protect senior and vulnerable investors, 17 of the 31 states that have adopted the NASAA model have added language in their state rules that allows for holds on transactions. Our concern with the proposed FINRA change is that the divergence between FINRA's requirements and the state requirements will inadvertently cause an undue burden for member firms, and/or have a chilling effect on firms' use of holds.

Similarly, if FINRA extends the hold period beyond 25 days (whether to 55 days as FINRA proposed or beyond, as we propose herein), the change will result in a discrepancy between the state regulatory hold periods<sup>6</sup> and FINRA's rule. This will create an unnecessary onus on firms that will still be required to abide by the current 25 business day hold periods under state law and therefore unable to take advantage of the FINRA rule change. We are hopeful that once FINRA's proposed amendments are adopted, states that have adopted the NASAA Model Act will amend their rules to align with FINRA's requirements and harmonize the regulatory framework.

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<sup>4</sup> See, e.g., Account Packet – LPL Master Account Agreement available at <http://lpl.com/disclosures/account-agreements-account-packets.html>

<sup>5</sup> See NASAA Model Act to Protect Vulnerable Adults from Financial Exploitation available at: <https://www.nasaa.org/industry-resources/senior-issues/model-act-to-protect-vulnerable-adults-from-financial-exploitation/>

<sup>6</sup>Ibid.

An additional area of divergence between FINRA and state law is in the definition of "Specified Adult." Recognizing that many people begin a cognitive decline earlier than the age of 65, 17 states have adopted legislation that defines a "Specified Adult" as someone aged 62 or older. We request that FINRA consider amending its definition of a "Specified Adult" to be aged 60 or 62 to close a crucial gap that can leave a critical aging population vulnerable and unprotected.

#### **Cognitive Decline and Diminished Capacity**

Finally, LPL would like to thank FINRA for summarizing and publishing the best practices regarding suspected customer cognitive decline and diminished capacity. This can be a difficult area to navigate, and the list of red flags allows us to align with others in the industry on how to recognize diminished capacity and cognitive decline.

#### **IV. Conclusion**

LPL greatly appreciates the opportunity to provide comments to FINRA on Proposed Amendments to Rule 2165. We are ardent supporters of the current FINRA rule and proposed expansions to protect senior investors and believe that tools that enable increased vigilance will lead to increased protections for our most vulnerable population. If you would like to discuss this letter further or have any questions, please contact me at [Redacted]

Sincerely,

A handwritten signature in black ink, appearing to read 'Katrina', with a stylized flourish extending to the right.

Katrina A. Carroll  
Chief Anti-Money Laundering Officer  
Executive Vice President  
Financial Crimes Compliance



**Carrie L. Chelko**  
SVP & Chief Compliance Officer  
Fidelity Brokerage Services LLC  
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December 4, 2020

*Submitted electronically:* [pubcom@finra.org](mailto:pubcom@finra.org)

Jennifer Piorko Mitchell  
Office of the Corporate Secretary  
FINRA  
1735 K Street NW  
Washington, DC 20006-1506

**Re: FINRA Regulatory Notice 20-34: Proposed Amendments to FINRA Rule 2165 and Retrospective Rule Review Report**

Dear Ms. Mitchell:

Fidelity Investments ("Fidelity")<sup>1</sup> appreciates the opportunity to provide comments to the Financial Industry Regulatory Authority ("FINRA") on Regulatory Notice 20-34 (the "Notice") regarding proposed enhancements to FINRA Rule 2165 (Financial Exploitation of Specified Adults). Fidelity fully supports FINRA's efforts to protect senior investors and other vulnerable persons from financial exploitation. Since its adoption in 2017, FINRA Rule 2165 has provided member firms with new tools to combat financial exploitation. In particular, the ability to place a temporary hold on a disbursement of monies from a client account has provided added protections for vulnerable Fidelity customers.

Fidelity appreciates FINRA's retrospective review of Rule 2165 and submits this comment letter in support of the two proposed changes. We believe that these changes to Rule 2165 will provide even better tools for Fidelity and other member firms to prevent financial exploitation of vulnerable adults.

## **I. Extension of the Length of Time for Holds**

Currently, Rule 2165 allows a member firm to place a temporary hold on a disbursement of funds from the account for up to twenty-five (25) business days when the firm reasonably believes there is financial exploitation. This hold is of a limited duration and is designed to enable a member firm to promptly investigate perceived exploitation. Unfortunately, the limited duration is very often an inadequate amount of time. While member firms promptly investigate an exploitive act, the member firm also as appropriate involves the Adult Protective Services (APS) state or county agency, law enforcement, courts and/or applicable state regulators ("state entities"). The relevant state entities have much broader investigative powers and need additional

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<sup>1</sup> Fidelity Investments is a leading provider of investment management, retirement planning, portfolio guidance, brokerage, benefits outsourcing, and many other financial products and services. Fidelity submits this letter on behalf of our broker-dealers and FINRA members Fidelity Brokerage Services LLC, Fidelity Distributors Corporation, and National Financial Services LLC.



Office of the Corporate Secretary, FINRA

December 4, 2020

Page 2 of 2

time to investigate the reported exploitation. Under the proposed amendments, extending the hold for an additional thirty (30) business days will enable the relevant state entities to conduct and complete an investigation. As such, Fidelity supports this extension to ensure the protection of senior clients and vulnerable adults who may be victims of financial exploitation.

## **II. Permitting a Temporary Hold on Both Disbursements and Transactions**

Rule 2165 currently permits a financial services provider to place a temporary hold on a disbursement of funds from an account if the firm reasonably believes there is financial exploitation. In the Notice, FINRA proposes to expand the rule to include temporary holds on transactions. This will allow member firms to temporarily hold certain client instructions if the firm reasonably believes that the instructions are the result of a financial exploitation. Fidelity supports this proposed amendment and believes that it will provide further protections from exploitative purchases, sales or asset liquidations. Indeed, these safeguards are critical to ensure that a client does not experience additional financial harms like adverse tax consequences, surrender charges or other risks associated with purchasing or selling securities, either with cash or on margin. We believe FINRA's requirements to have written supervisory procedures to identify, escalate and report financial exploitation are appropriate safeguards to ensure protection for senior investors and other vulnerable adults.

\* \* \*

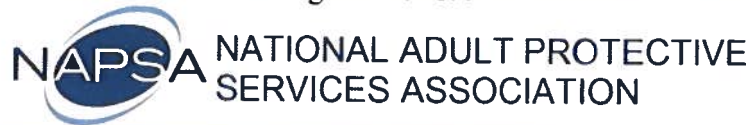
Fidelity would be pleased to provide further information, participate in any direct outreach efforts that FINRA undertakes, or respond to questions FINRA may have about our comments.

Sincerely,



Carrie L. Chelko  
SVP & Chief Compliance Officer  
Fidelity Brokerage Services LLC

cc: James S. Wrona, Vice President & Associate General Counsel  
Jeannette Wingler, Associate General Counsel



December 4, 2020

Marcia E. Asquith  
Executive Vice President, Board and External Relations  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

**Re: Regulatory Notice 20-34**

The National Adult Protective Services Association's (NAPSA) Policy Leadership is pleased to comment on FINRA's Regulatory Notice 20-34 (Proposed Amendments to FINRA Rule 2165 and Retrospective Rule Review Report). We applaud FINRA for continuing to prioritize the protection of senior investors and the great work in this area.

**Hold Period**

NAPSA agrees with FINRA's recommendation to extend the hold period an additional 30 business days. While we suggested 60 days in our initial comments, we are supportive of the proposed total of a 55-business day hold extension. The survey data from your members supports this extension as well as data from Adult Protective Services programs (APS). The latest data submitted to the federal National Adult Maltreatment Reporting System (NAMRS) indicates the average investigation duration of all reported cases is 52.6 days<sup>1</sup>. Recognizing that financial exploitation investigations are often more complicated and time consuming, we appreciate the additional days as a starting point with the ability to revisit as more data becomes available.

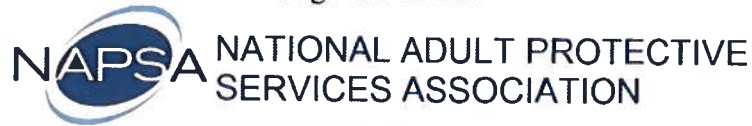
We would like a clarification on the wording in the last paragraph of the Hold Period which states "FINRA is proposing amending Rule 2165 to permit extending a temporary hold for an additional 30 business days if the member firm had reported the matter to a state agency or court of competent jurisdiction." We are commenting on the notable absence of law enforcement from the equation as some cases are reported to law enforcement without the involvement of APS and sometimes it is local and not state law enforcement that is involved.

We would again like to emphasize the diversity in APS programs and difficulty in obtaining an extension of a temporary hold from an APS agency or a court. NAPSA welcomes partnership with FINRA to bring awareness and solutions to this challenge as we have developed new protocol and forms around this matter.

**Transactions in Securities**

NAPSA is pleased to see that FINRA is recommending holds should be extended to matters beyond disbursements. We applaud proposed creation of the first uniform national standard for placing holds on transactions related to suspected financial exploitation.

This is an important step in the protection of investors.

**Cognitive Decline or Diminished Capacity**

NAPSA reiterates our position that Rule 2165 be expanded to include temporary holds on transactions when a firm is concerned about customers managing their own assets as opposed to only when there is financial exploitation by a third party. FINRA has decided not to propose to extend Rule 2165 in this scenario and cites lack of expertise and too much discretion on part of the members as well as impeding on the autonomy of the investor as their major concerns. We share some of the concerns and recognize that this is a sensitive and complicated matter. However, we think this is overshadowed by the potential harm to investors if action is not taken and concerns can be addressed in an appropriate manner.

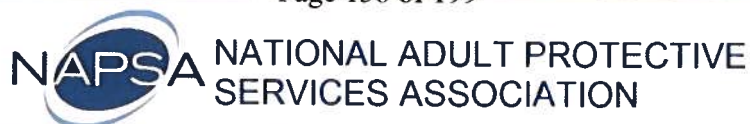
Financial service professionals are in a unique position of often being the first and only place to detect the potential of financial harm. We know the devastating effect wealth loss has on older investors who are not in a position to reclaim the losses. We believe that through experience and education offered by FINRA, as well as many other entities, that many members have or can get the required expertise to recognize the red flags and the hold would enable the investor to be protected while an investigation is completed. Existing protections in the process put in by FINRA and the individual firms mitigate the discretion that individuals would have.

Many studies link cognitive ability to financial decision making. Data reported by APS programs report that over 31% of victims of financial exploitation suffer from cognitive issues<sup>i</sup>. A 2019 study in Health Economics concluded that people in the early stages of Alzheimer's Disease (AD) face a heightened risk of damaging financial outcomes<sup>ii</sup>. Stiegel reported in 2012 that people in early stages of Alzheimer's disease are more likely to be susceptible to financial exploitation and fraud by others<sup>iv</sup>. Wood and Lichtenberg stated in 2017 that "individuals who are mildly impaired prior to AD are the perfect victims as they have control of their assets but have impairment that may not be recognized and have broad exposure to the community."<sup>v</sup> We think it is critical that the ability to hold and report be maximized here.

**Trusted Contacts**

The requirement of member firms to obtain the name of and contact information for a trusted contact person upon the opening of a non-institutional customer's account or when updating account information for a non-institutional account is a great resource for investor protection and the benefits are clear. We would like to see a higher usage rate. Information in this regulatory notice was unclear on actual usage rate as it was stated that most survey respondents reported a 25% or less of the firm's existing or new clients had provided trusted contact information. Data on practices and usage would be helpful in advancing this resource.

We recommended that FINRA look at other industries that have similar requirements and a much higher success rate. We are recommending more specific ideas to promote trusted contacts be provided such as FINRA publishing stories of how the provision has helped protect investors, video discussion with the trusted contact and client which proved instrumental in stopping exploitation and fraud, or other materials. We would like to see the FINRA Foundation create an annual educational campaign to promote the use and benefits of having a trusted contact person on the account. Older investors are used to similar annual campaigns during the Medicare open enrollment period. Such a campaign for trusted contacts would support ease in navigation.



**Application of Hold Rules**

NAPSA continues to recommend that the hold rules apply to investment companies (e.g. mutual funds). Currently, the SEC has made " suggestions" but nothing stronger. Oftentimes, they are the custodian of the actual assets and there is nothing to be done to hold the actual assets if the client goes to them directly circumventing the broker-dealer.

Thank you for the opportunity to comment and we look forward to working with you in the future on behalf of senior investors.

Sincerely,

*Lori Delagrammatikas*  
Executive Director  
National Adult Protective Services Association

*William Benson & Kendra Kuehn*  
National Policy Advisers  
National Adult Protective Services Association

*Joe Snyder*  
Policy Chair  
National Adult Protective Services Association

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<sup>i</sup> McGee, L and Urban K (2020) Adult Maltreatment Data Report 2019. Submitted to the Administration for Community Living, US Department of Health and Human Services pg. 15.

<sup>ii</sup> McGee, L and Urban K (2020) Adult Maltreatment Data Report 2019. Submitted to the Administration for Community Living, US Department of Health and Human Services pg. 27.

<sup>iii</sup> Roan Gresenz, Carole, Mitchell, Jean M., Marrone, James and Federoff, Howard A. (2019) Effects of Early-stage Alzheimer's on household financial outcomes. Health Economics, Volume 29, Issue 1, January 2020 pgs. 18-29.

<sup>iv</sup> Stiegel, Lori A., (2012) An Overview of Elder Financial Exploitation. Generations 36 73-80.

<sup>v</sup> Woods, S., Lichtenberg, P.A. (2017) Financial Capacity and Financial Exploitation of Older Adults: Research Findings, Policy Recommendations and Clinical Implications. Clinical Gerontologist, 40 (1), 3-13.



December 2, 2020

**Via Email to [pubcom@finra.org](mailto:pubcom@finra.org)**

Jennifer Piorko Mitchell  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

**Re: Regulatory Notice 20-34 – FINRA Requests Comments for Proposed Amendments to FINRA Rule 2165**

Dear Ms. Mitchell:

The University of Miami School of Law Investor Rights Clinic (“IRC”) greatly appreciates the opportunity to comment on the proposed amendments to FINRA Rule 2165.<sup>1</sup> The IRC is a University of Miami School of Law clinical program that represents investors of modest means who have suffered investment losses, but due to the size of their claims cannot find legal representation. As the only *pro bono* organization in Florida assisting investors of modest means, the IRC has assisted numerous elderly investors who have suffered financial losses. For many of our clients, these losses represent their life savings. The IRC has a strong interest in rules relating to the protection of elderly investors.

**I. FINRA’s Proposed Amendments to Rule 2165(a)**

In February 2017, the Securities Exchange Commission (“SEC”) approved the adoption of the new FINRA Rule 2165, which allowed 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.<sup>2</sup> Additionally, the SEC further approved amendments to FINRA Rule 4512<sup>3</sup> to require members to make reasonable efforts to obtain the name of and

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<sup>1</sup> FINRA Rule 2165 – Financial Exploitation of Specified Adults.

<sup>2</sup> Financial Exploitation means: “(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 power of attorney, guardianship, or any other authority regarding the 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.” FINRA Rule 2165(a)(4).

<sup>3</sup> FINRA Rule 4512 – Customer Account Information.

contact information for a trusted contact person for a customer's account. New Rule 2165 and the amendments to Rule 4512 became effective February 5, 2018. In August 2019, 18 months after the effective date, FINRA conducted a retrospective review of FINRA Rule 2165 to determine what changes, if any, should be made. The IRC submitted a comment letter during the retrospective review.<sup>4</sup>

Currently, Rule 2165 provides brokerage firms with a safe harbor to place a temporary hold on a disbursement of funds or securities from the account of a Specified Adult<sup>5</sup> customer for up to 25 business days. The rule also provides that this period may be terminated or extended by a state agency or a court of competent jurisdiction. As a result of its retrospective review, FINRA is proposing two amendments to Rule 2165. The first amendment would allow firms to place holds on *securities transactions* when the firm reasonably believes financial exploitation of a Specified Adult has occurred, is occurring, has been attempted or will be attempted. Second, FINRA proposes to extend the temporary hold period for an additional 30 business days. The IRC fully supports FINRA's proposed amendments as they will provide greater protection to seniors and vulnerable adults that may be victims of financial exploitation.

**A. Rule 2165's Safe Harbor Should Be Extended to Apply to Transactions in Securities in Addition to Disbursements of Funds and Securities**

There is substantial damage that can result from exploitation in securities transactions. As FINRA acknowledges in the Notice, at least 16 states already allow investment advisers or broker-dealers to place some form of hold on securities transactions as well as disbursements.<sup>6</sup> Someone who is in a position of trust can gain access to the customer's brokerage account and direct the liquidation of securities that have been held for years. Even if the firm decides to place a hold on the subsequent disbursement of the sale proceeds, significant damage may have already occurred, including tax consequences to the customer.

In other cases, a person of trust may decide to take control of the account and engage in speculative trading. For example, the IRC represented an elderly client whose son gained access to her account, sold her securities holdings, and then engaged in the purchases of speculative securities on margin. Unfortunately, in a very short time, she lost most of her funds.

Extending Rule 2165's safe harbor to include securities transactions would provide the firm with the opportunity to halt the sale of long-held securities where there is an objectively

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<sup>4</sup> University of Miami School of Law Investor Rights Clinic Comment Letter dated October 1, 2019.

<sup>5</sup> A Specified Adult is: "(A) a natural person age 65 and older; or (B) a natural person age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests." FINRA Rule 2165(a)(1).

<sup>6</sup> Financial Industry Regulatory Authority, Regulatory Notice 20-34, *Proposed Amendments to FINRA Rule 2165 and Retrospective Rule Review Report* at 6 (Oct. 5, 2020), <https://www.finra.org/rules-guidance/notices/20-34>.

reasonable belief that financial exploitation is occurring. The proposed holds for securities transactions need not be established for the maximum amount of time allowed by the rule. For example, if the firm is able to quickly verify whether exploitation is occurring, it can unfreeze the transaction, causing virtually a minimal disruption on the customer's investments. Moreover, appropriate policies, procedures, and training can minimize the misapplication of the rule. The IRC applauds and fully supports the hold extension to securities transactions.

#### **B. Rule 2165's Temporary Hold Should be Extended as Proposed**

Detecting financial exploitation may take more than thirty (30) days. If a firm needs to go beyond the twenty-five days it is likely because there is a high probability of financial exploitation. Indeed, it may be harder for the firm to detect financial exploitation when the trusted person is the one engaging in the exploitation. For example, a trusted person may be misrepresenting the needs or wishes of a senior who has diminished capacity. Therefore, the firm will need the time to conduct its due diligence in determining if there is an issue, including whether the trusted contact is the one that is behind the financial exploitation.

The proposed thirty additional days will allow for a more thorough and precise investigation. However, the Clinic takes the position that if the account is put on hold, the customer should still be allowed to make certain withdrawals from his or her account. For example, if a senior is suspected of being financially exploited, his or her account will be put on a temporary hold for a maximum of fifty-five days based on the proposed amendment. There may be expenses or fees that need to be covered throughout that time, therefore, it should not be a complete hold on the account. Periodic or "normal" transactions should still be allowed to be made during this period.

### **II. Additional Suggested Improvements to Protect Seniors From Financial Exploitation**

Senior exploitation is a significant problem with losses of nearly \$3 billion per year.<sup>7</sup> According to a Met Life study conducted in 2009, "the 'typical' victim is between 70 and 89, white, female, frail, cognitively impaired, trusting, and often lonely or isolated."<sup>8</sup> The study also noted that over 40% of the perpetrators of abuse were family, spouses, and caregivers and 18% of the perpetrators were trusted professionals such as attorneys, financial professionals, and fiduciary agents.<sup>9</sup>

As we explained in our October 2019 letter, Rule 2165 is a safe harbor, providing firms the ability to place holds on disbursements and, if amended, securities transactions. However,

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<sup>7</sup> Teresa Verges, *The Broker-Dealer's Role in the Detection and Prevention of Elderly Financial Exploitation*, 23 PIABA B.J. 231 (2016).

<sup>8</sup> Teresa Verges, *Legal Ethics and an Aging Population: Securities Practitioners' Roles in Preventing Financial Exploitation of the Elderly*, YES PRACTICING LAW INSTITUTE 1, 2 (2017).

<sup>9</sup> *Id.*

the rule does not require firms to do so. This does not incentivize a firm to actually put policies in place, written supervisory procedures, and training to actually protect vulnerable adults. FINRA should consider amendments to Rule 2165 *requiring* firms to implement such procedures. This is beneficial for senior investors because it will give them a guarantee that their accounts or transactions will be placed on hold until an investigation ensues.

Furthermore, Rule 2165 is only triggered when there is suspected financial exploitation. FINRA should consider what member firms should do if their customer is dissipating assets because of increasing cognitive decline or dementia. At minimum, firms should be encouraged to implement written supervisory procedures that include contacting a “trusted contact person” to alert that person of any red flags or concerns.

### **III. Conclusion**

The IRC is committed to protecting senior investors and other vulnerable adults. The IRC strongly supports FINRA’s efforts to provide further protection to this susceptible group. In summary, the IRC asks that FINRA adopt the proposed amendments, and in addition make the mandatory hold period a requirement when there is suspicion of senior financial exploitation. The IRC thanks FINRA for the opportunity to comment on this important topic.

Respectfully,

/s/ Fabian Garcia

Fabian Garcia

Investor Rights Clinic, *Legal Intern*

/s/ Sean Hughes

Sean Hughes

Investor Rights Clinic, *Legal Intern*

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**Edward Jones**

*Privileged and Confidential*

November 9, 2020

FINRA

Office of the Corporate Secretary  
Attn: Jennifer Piorko Mitchell  
1735 K Street, NW  
Washington, DC 20006-1506

*Re: FINRA Regulatory Notice 20-34 – Proposed Amendments to FINRA Rule 2165 and Retrospective Rule Review Report*

Dear Ms. Piorko Mitchell:

Edward Jones appreciates the opportunity to submit comments on FINRA's proposed amendments to Rule 2165. As discussed below, we support extending the temporary hold period on a client's account for an additional 30 days if the member firm has reported the matter to a state agency or a court of competent jurisdiction, and permitting member firms to place a temporary hold on a transaction in securities when the firm has a reasonable belief that the client is being financially exploited. In our view, both measures will serve to complement current regulations and strengthen protections for senior investors.

Edward Jones is one of the largest financial services firms in the United States, serving the needs of over seven million U.S. investors through personalized service provided by over 19,000 financial advisors. We focus on serving the needs of the long-term individual investor by establishing personal relationships, understanding their needs and implementing tailored solutions to help them achieve their financial goals.

We provide the following comments for your consideration.

Edward Jones strongly supports additional measures to protect senior and vulnerable investors

We applaud FINRA for proposing new measures to protect and serve senior investors and other vulnerable adults. With over 10,000 Americans turning 65 every day and an estimated 1 in 5 Americans aged 65 or older being victimized by financial fraud, we recognize this is a significant concern and a problem that is likely to continue to grow.

Edward Jones is strongly committed to protecting senior and vulnerable investors and believe the proposed measures meaningfully build upon the current investor

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**Edward Jones**

protections in Rule 2165. We have worked aggressively to build client awareness of the ability to add a trusted contact and currently over 7.9 million of Edward Jones' client accounts have taken this important step. In 2020, we have engaged trusted contacts more than 1,200 times in response to concerns ranging from inability to contact a client, to issues associated with diminished capacity or cognitive impairment and suspected financial exploitation. We have also found the ability to place a temporary hold on a client's disbursement of funds where there is a reasonable belief of financial exploitation has been a very effective investor protection measure. To date in 2020, we have utilized this provision 43 times, preventing more than \$3.3 million from leaving client accounts due to suspected financial exploitation. We believe the current proposal will help us further reduce financial losses resulting from senior and vulnerable adult exploitation.

Edward Jones supports extending the hold period for an additional 30 days when a matter has been reported to a state agency or a court of competent jurisdiction

Edward Jones recognizes that placing a temporary hold on client funds is a significant step, but strongly supports the ability to do so when faced with circumstances where we suspect financial exploitation of a senior or vulnerable investor. Senior and vulnerable investors who are victims of financial exploitation often face not only financial devastation, but too often it also has significant impacts on their overall health and wellbeing.

While we are often able to quickly resolve matters where we suspect financial exploitation of a senior or vulnerable investor by engaging the trusted contact or using other existing tools, we have experienced situations where the current 25-day period provided under Rule 2165 is insufficient. We have particularly experienced this situation when working with state agencies, such as Adult Protective Services, to investigate a case of suspected financial exploitation. Unfortunately, some Adult Protective Services agencies are not adequately resourced to quickly review these matters and yet are hesitant to request an extension of a hold until they determine whether exploitation exists.

Edward Jones supports FINRA's proposal to extend the hold period for an additional 30 days when a matter has been reported to a state agency or a court of competent jurisdiction. This would serve as a meaningful enhancement to the current investor protection measure and help ensure that member firms are not placed in a position where they may have to remove an existing hold, and risk funds leaving a client's account, while the firm continues to investigate a situation involving suspected financial exploitation of a senior or vulnerable investor.

We would also urge FINRA, the SEC and state securities regulators to continue providing training and support to Adult Protective Services and related agencies

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**Edward Jones**

on financial exploitation of senior and vulnerable investors so they have the expertise necessary to conduct timely reviews of matters involving suspected financial exploitation and to realize the full investor protection benefits of this rule proposal.

#### Edward Jones supports extending Rule 2165 to include transactions

As noted above, Edward Jones has actively utilized the current Rule 2165 to place a temporary hold on the disbursement of funds when financial exploitation of a senior or vulnerable investor is suspected and has seen the rule deliver meaningful investor protection benefits. We believe the rule can be further strengthened by expanding it to also include exploitative transactions, which can also lead to significant financial harm for vulnerable investors.

The financial harm resulting from exploitative transactions can take many forms, including selling long-held investments with low cost basis resulting in a significant tax liability; the sale of fixed income investments with yields more attractive than today's rates; and the sale of variable annuities, which could lead to surrender charges. The perpetrator of the exploitation could also utilize the proceeds of these sales to invest in high-risk securities further jeopardizing the financial security of the senior or vulnerable investor.

We are cognizant that holding a transaction for a temporary period of time is not a decision to be taken lightly and that there may be risks of market movement associated with this decision. Nonetheless, when balanced against the potential financial devastation to the senior or vulnerable investor we believe this proposal is a natural extension of the current rule that will further minimize the risk of financial harm and provide greater protection for senior and vulnerable investors.

#### Conclusion

Edward Jones appreciates the opportunity to provide comments on this rule proposal. We strongly support FINRA's efforts to promote additional measures to better protect and serve senior investors and other vulnerable adults. We also commend FINRA, the SEC, NASAA and other financial services regulators for their collaborative efforts in promoting a consistent regulatory framework to provide financial services professionals with the right tools and clear guidance to further enhance senior and vulnerable investor protections.

We look forward to continuing to engage with FINRA on finding new ways to better protect and serve senior and vulnerable investors. If you have any questions regarding the comments contained in this letter, please contact me at  
[Redacted]

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**Edward Jones**

Sincerely,



Jesse Hill  
Principal – Government and Regulatory Relations



NASAA

NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

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December 8, 2020

By email to: [pubcom@finra.org](mailto:pubcom@finra.org)

Jennifer Piorko Mitchell  
Office of the Corporate Secretary  
Financial Industry Regulatory Authority, Inc.  
1735 K Street, NW  
Washington, DC 20006-1506

Re: **Regulatory Notice 20-34: Senior Investors – Proposed Amendments to FINRA Rule 2165 and Retrospective Rule Review Report**

Dear Ms. Mitchell:

On behalf of the North American Securities Administrators Association, Inc. (“NASAA”),<sup>1</sup> I am writing in response to the Financial Industry Regulatory Authority (“FINRA”) *Regulatory Notice 20-34: Senior Investors – Proposed Amendments to FINRA Rule 2165 and Retrospective Rule Review Report* (the “Proposal”).<sup>2</sup> The Proposal is of particular interest to NASAA and its members given that senior investors are increasingly targeted for fraud and abuse. NASAA also appreciates FINRA’s focus on protecting persons with mental or physical impairment.

NASAA, FINRA, and the SEC have worked collaboratively on senior investor protection issues and concerns in the past, and we look forward to doing so again here.<sup>3</sup> NASAA previously

<sup>1</sup> Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA’s membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

<sup>2</sup> The Proposal is available at <https://www.sec.gov/rules/sro/finra/2020/34-89218.pdf>.

<sup>3</sup> See Press Release: SEC, NASAA, and FINRA Issue Senior Safe Act Fact Sheet to Help promote Greater Reporting of Suspected Senior Financial Exploitation FOR IMMEDIATE RELEASE 2019-75 (May 23, 2019) available at [https://www.sec.gov/news/press-release/2019-75#\\_ftnref1](https://www.sec.gov/news/press-release/2019-75#_ftnref1); Economic Growth, Regulatory Relief and Consumer Protection Act, Pub. L. 115-174 § 303 (2018); Commissioner Allison Herren Lee, *Remarks at the SEC Roundtable on Combating Elder Investor Fraud* (Oct. 3, 2019), available at <https://www.sec.gov/news/public-statement/lee-remarks-sec-roundtable-combating-elder-investor-fraud>.

Jennifer Piorko Mitchell  
 December 8, 2020  
 Page 2 of 5

commented on FINRA's retrospective rule review,<sup>4</sup> as well as the proposing release for Rule 2165<sup>5</sup> and Rule 4530. We appreciate FINRA's consideration of our comments on this important matter.<sup>6</sup>

As currently written, the NASAA Model Act to Protect Vulnerable Adults from Financial Exploitation (the "Model Act")<sup>7</sup> and FINRA Rule 2165<sup>8</sup> generally complement each other.<sup>9</sup> This alignment ensures that broker-dealers and investment advisers observe the same standards when confronted with the signs of potential financial exploitation of a vulnerable person. Today, one of the actions that a broker-dealer (under FINRA rules) or investment adviser (under certain state laws) may take is placing a hold on the disbursement of funds for a specified time period. FINRA has proposed to expand the scope of Rule 2165 to include transactions and lengthen the period of time such holds may remain in effect.

Whether to extend the hold to include transactions and the appropriate time for holding disbursements or transactions were questions that NASAA considered in drafting the Model Act. Ultimately NASAA declined to include transactions, noting the following concerns: investor autonomy, best execution requirements, potential for firm abuse, and potential for market losses. Should FINRA decide to move forward with its proposal to add transactions to the existing disbursement hold and extend the time period for each, we recommend the following changes.

**I. FINRA Should Require Firms to Notify State Agencies of Holds No Later Than 15 Business Days After They Are Imposed.**

The Proposal would permit a broker-dealer to extend a temporary hold for up to 55 business days if it reports the hold or otherwise notifies an appropriate state regulator, agency, or court. NASAA believes that the current 25 business day hold period, with the added safety valve of extensions under the authority of state agencies or the courts, is the better approach as it provides significant time to conduct the investigation and avoids unintended hardships from lengthy delays. While there may be instances where investigating the questions underlying a hold takes longer

<sup>4</sup> See Letter from Christopher Gerold, NASAA President, to Jennifer Piorko Mitchell, FINRA Office of the Corporate Secretary, *Re: Regulatory Notice 19-27: Retrospective Rule Review* (Oct. 8, 2019), available at <https://www.nasaa.org/wp-content/uploads/2019/10/NASAA-Comment-Letter-Re-Reg-Notice-19-27-10-8-19.pdf> ("NASAA 19-27 Comment Letter").

<sup>5</sup> See Letter from Judith Shaw, NASAA President, to Marcia E. Asquith, FINRA Office of the Corporate Secretary, *Re: Regulatory Notice 15-37: Financial Exploitation of Seniors and Other Adults* (November 30, 2015), available at <https://www.nasaa.org/wp-content/uploads/2011/07/Final-NASAA-Comment-to-FINRA-15-37.pdf> ("NASAA 15-37 Comment Letter").

<sup>6</sup> See NASAA 19-27 Comment Letter 2-3, 5, and 8-10; and Proposal at 12-17.

<sup>7</sup> NASAA Model Legislation to Protect Vulnerable Adults from Financial Exploitation, January 22, 2016 (the "Model Act"), available at <http://serveourseniors.org/wp-content/uploads/2015/11/NASAA-Model-Seniors-Act-adopted-Jan-22-2016.pdf>.

<sup>8</sup> FINRA Rule 2165.

<sup>9</sup> Compare *id.* (15 day hold period with extensions by agency or court, subject to 10 day extension at member firm's discretion; further hold with regulator or court discretion) with NASAA Model Act (15 day hold period, subject to 10 day extension at securities commissioner or APS discretion; further hold with court discretion).

Jennifer Piorko Mitchell  
 December 8, 2020  
 Page 3 of 5

than 25 days, the present requirement that firms obtain approval for such an extension from an appropriate authority,<sup>10</sup> such as a regulatory authority or a court, strikes the appropriate balance and ensures that both the investor and the broker-dealer have the opportunity to voice concerns in front of an independent arbiter.

In a majority of states, firms are subject to legislative and regulatory requirements in addition to those set forth in Rule 2165.<sup>11</sup> In those jurisdictions, the securities regulator and adult protective services (or like agency) would be notified of potential financial exploitation well before any notice would be provided under proposed Rule 2165 (if the firm wishes to invoke the civil and regulatory safe harbor provisions under a state's version of the Model Act). In jurisdictions that do not mandate disclosure to a state agency, however, the Proposal would increase the scope of a potentially negative trend in which broker-dealers have the authority to delay disbursements and deny investors access to their funds for up to 55 business days. Meanwhile, state agencies and those equipped to deal with financial exploitation or other abuses against the "Specified Adult" could be oblivious to the potential harm for up to five weeks.<sup>12</sup> We question whether this fact scenario facilitates the best interests of the investor.

NASAA has previously taken the position that FINRA and state agencies should be notified within two business days any time a hold is placed on an investor's account. If a firm must form a reasonable belief that exploitation has occurred or will be attempted in order to place a hold in the first place, it makes sense to require the firm to share that belief with appropriate authorities who can intervene to protect the investor and determine whether other measures may be necessary to protect the investor from exploitation.<sup>13</sup> We note in passing that the escalation to state agencies does not relieve the firm of the obligation to conduct its own investigation and report as required under the Model Act or FINRA reporting requirements. However, as holds are an extraordinary action and method of last resort, engaging appropriate regulatory entities and state agencies as soon as feasible would advance the cause of protecting vulnerable adults.

While FINRA revisits this rule, we think it more appropriate to involve state agencies and adult protective services within the initial 15 business day hold period specified in Rule 2165(b)(2). The importance of doing so is noted in Regulatory Notice 20-24, that the most common reason firms were unable to resolve a matter within the 25 day hold period was that the matter was under consideration by a state agency (such as APS) or a court. Notification as soon as possible allows firms to continue their internal review of the potential fraud, remain in contact with the investor,

<sup>10</sup> See Rule 2165(b)(2)-(c); supra FN 9. As currently written, firms can hold disbursements for 15 days, with a discretionary 10-day extension, or seek state agency or court approval to extend the hold period for further investigation and review.

<sup>11</sup> See Proposal at 6 noting that 31 states have senior investor protection and disbursement hold laws.

<sup>12</sup> NASAA realizes that FINRA has not initiated any actions for a abuse of the disbursement hold provision and would take swift action under the Just and Equitable Principles of Trade (FINRA Rule 2010) against bad actors. Through internal conversations and surveys, FINRA and states have not had to take such actions under the current rule or state laws. However, for NASAA it is still a concern that a firm could, in theory, separate an investor from funds or transactions for up to 11 weeks.

<sup>13</sup> NASAA 15-37 Comment Letter at 6.

Jennifer Piorko Mitchell  
 December 8, 2020  
 Page 4 of 5

and communicate with the regulator if or when more time is needed to follow up on an investigation. This process, along with information sharing and collaboration with state agencies and adult protective services, would better serve to protect investors and proactively identify potential exploitation and abuse. While not as effective as immediate notification, providing notice within the initial 15 business day period would better allow appropriate state agencies to do two things: (1) to determine whether actions beyond the hold at issue are needed to protect the investor; and (2) to monitor the actions of the firm to the extent that they feel it is necessary to make sure the firm is acting in the investor's best interest, both in terms of the initial hold decision, and in terms of its subsequent investigation and deliberations. An earlier notification requirement – with the possibility of contemporaneous regulatory inquiry and oversight – would help ensure that firms act carefully and responsibly with the power provided by Rule 2165.

## **II. Firms Should Demonstrate Why Transaction Holds Are Necessary to Protect Clients.**

In its current form, the Model Act provides only for holds on disbursements in cases of suspected exploitation.<sup>14</sup> As noted above, at the time of its adoption, NASAA believed that the most good would be done, with the least intrusion on investor autonomy, through the disbursement hold alone, as it is generally the money leaving a client account that results in investor harm.

Since the Model Act's adoption, over 30 states have adopted or are about to adopt their own report and hold laws that in large measure follow the Model Act. However, certain of these states, though conforming to the Model Act's basic structure, allow holds on disbursements, transactions related to a disbursement, or transactions as a whole (which include disbursements) within client accounts.<sup>15</sup> If FINRA extends the safe harbor under Rule 2165 to transactions, the supervision and documentation requirements under Rule 2165(c)-(d), and the training specified under Supplementary Material .02 to Rule 2165, must be enhanced to require a documented rationale stating why the broker and firm believe that a transaction hold will protect the investor whereas a disbursement hold would not. This documentation should be reviewed as a part of all FINRA examinations if it is not already. FINRA should stress that in the already limited use cases for Rule 2165, disbursement holds should be the default. A transaction hold should be utilized where a disbursement hold cannot adequately protect an investor. Furthermore, FINRA should provide guidelines for firms to establish policies and procedures to address the investor harm that may result from putting a transaction hold in place including investor losses and other hardships.<sup>16</sup>

<sup>14</sup> NASAA 19-27 Comment Letter at 2-3. NASAA noted a conscious decision to limit holds to disbursement resting on three prongs: First, limiting the delay to disbursements respects the rights of clients, regardless of age, to direct the management of their funds absent some legal determination of incapacity. Second, a delay in the transaction could be deemed inconsistent with best execution requirements. Third, allowing a delay in transactions could result in greater loss or gain on the account depending upon market volatility at the time, increasing potential litigation and reputational risk for the firm.

<sup>15</sup> See, e.g. S.B. 1438, 54th Leg., 1st Reg. Sess. (Ariz. 2019); S.B. 496, 2019-2020 Reg. Sess., (Cal. 2019); S.B. 433, 146th Leg., Reg. Sess. (R.I. 2019).

<sup>16</sup> For example, if a broker dealer placed a transaction hold on an elderly investor's account who was concerned by Covid-19 and wished to withdraw all investments on March 1, 2020, the account would have lost 40% of its value by the time the 25 business day hold period lapsed under the current version of Rule 2165. The firm

Jennifer Piorko Mitchell  
December 8, 2020  
Page 5 of 5

**III. Conclusion.**

NASAA supports the work of FINRA in protecting senior investors, and we appreciate the opportunity to comment on the Proposal. We look forward to FINRA's continued partnership with the SEC and state securities in protecting vulnerable investors.

Should you have questions, please contact either the undersigned or NASAA Counsel, Kameron Hillstrom, at (202) 737-0900.

Sincerely,



Lisa Hopkins  
NASAA President  
General Counsel and Senior Deputy  
Commissioner of Securities, West Virginia

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should have policies and procedures in place to address losses in the account and how it responds to impacted investors. This will alleviate ad hoc responses from disparate branch offices and promote equal treatment for all levels of investors.

December 4, 2020

**Via E-Mail**

Jennifer Piorko Mitchell  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

**Re: FINRA Regulatory Notice 20-34  
Proposed Amendments to FINRA Rule 2165 and Retrospective Rule Review  
Report**

Dear Ms. Mitchell:

We are submitting this letter on behalf of our client, the Committee of Annuity Insurers (the "Committee"),<sup>1</sup> in response to FINRA Regulatory Notice 20-34 *Proposed Amendments to FINRA Rule 2165 and Retrospective Rule Review Report* (the "Notice"), issued by the Financial Industry Regulatory Authority, Inc. ("FINRA") on October 5, 2020.<sup>2</sup> The Notice solicits comment on FINRA's proposed amendments to Rule 2165 (Financial Exploitation of Specified Persons).

**BACKGROUND**

In August 2019, FINRA launched a retrospective rule review to assess the effectiveness and efficiency of its rules and administrative processes that help protect senior investors from financial exploitation. As part of this retrospective rule review, FINRA sought comment on several questions with respect to addressing financial exploitation and other circumstances of financial vulnerability for seniors and vulnerable persons. In response to FINRA's retrospective rule review, the Committee submitted a comment letter ("2019 Comment Letter") that supported FINRA's review of its rules and administrative processes related to senior investors and vulnerable persons and raised a few additional points for FINRA's consideration.<sup>3</sup>

**FINRA Rule 2165.** Under the current framework, FINRA Rule 2165 permits a firm that reasonably believes that financial exploitation<sup>4</sup> has occurred, is occurring, has been attempted or

<sup>1</sup> The Committee is a coalition of many of the largest and most prominent issuers of annuity contracts. The Committee's 31 member companies represent more than 80% of the annuity business in the United States. The Committee was formed in 1981 to address legislative and regulatory issues relevant to the annuity industry and to participate in the development of insurance, securities, banking, and tax policies regarding annuities. For over three decades, the Committee has played a prominent role in shaping government and regulatory policies with respect to annuities at both the federal and state levels, working with and advocating before the SEC, CFTC, FINRA, IRS, Treasury Department, and Department of Labor, as well as the NAIC and relevant Congressional committees. A list of the Committee's member companies is attached as Appendix A.

<sup>2</sup> The Notice is posted at <https://www.finra.org/rules-guidance/notices/20-34>.

<sup>3</sup> The 2019 Comment Letter is available at [https://www.finra.org/sites/default/files/2019-10/19-27\\_Eversheds-Sutherland\\_comment.pdf](https://www.finra.org/sites/default/files/2019-10/19-27_Eversheds-Sutherland_comment.pdf).

<sup>4</sup> "Financial exploitation" includes: (A) the wrongful or unauthorized taking, withholding, appropriation, or use of a Specified Adult's funds or securities; or (B) any act or omission taken by a person, including through the use of a power of attorney, guardianship, or any other authority, regarding a Specified Adult, to: (1) obtain control, through deception, intimidation or undue influence, over the Specified Adult's money, assets or property; or (2) convert the Specified Adult's money, assets or property.

will be attempted to place a temporary hold on the disbursement of funds or securities from the account of a "Specified Adult" customer.<sup>5</sup> If a firm places a temporary hold, the firm must immediately initiate an internal review of the facts and circumstances that caused the firm to reasonably believe that financial exploitation of the Specified Adult has occurred, is occurring, has been attempted or will be attempted. In addition, the firm must provide notification of, and the reason for, the hold to the Trusted Contact Person<sup>6</sup> and all parties authorized to transact business on the account, including, but not limited to, the customer, no later than two business days after the date that the firm first placed the hold. A firm is not required to provide notification to the Trusted Contact Person or a party authorized to transact business on an account, respectively, if the Trusted Contact Person or party is unavailable or the firm reasonably believes the Trusted Contact Person or party has engaged, is engaged, or will engage in the financial exploitation of the Specified Adult.

Rule 2165 allows the firm to place a temporary hold on a Specified Adult customer's account for 15 business days after the date the firm first placed the temporary hold on the disbursement of funds or securities, unless otherwise terminated or extended by an order of a state regulator or agency or court of competent jurisdiction. In addition, the firm may extend the temporary hold for an additional 10 business days, if the firm's internal review of the facts and circumstances supports its reasonable belief that the financial exploitation of the Specified Adult has occurred, is occurring, has been attempted or will be attempted, unless otherwise terminated or extended by an order of a state regulator or agency or court of competent jurisdiction.

FINRA Rule 2165 also requires firms to retain records related to compliance with the rule, which must be readily available to FINRA upon request.<sup>7</sup>

**Proposed Amendments.** In response to comments received during the retrospective rule review, FINRA proposed to amend Rule 2165 to permit extending the temporary hold period for an additional 30 business days, if the firm had reported the matter to a state agency or a court of competent jurisdiction. This 30-business day hold period would be in addition to the initial 15-business day hold period outlined in Rule 2165(b)(2) and the additional 10-business day hold period outlined in Rule 2165(b)(3).

In addition, FINRA proposed amendments to establish a standard for placing holds on securities transactions related to suspected financial exploitation of Specified Adults. Under the proposed safe harbor, a firm would be permitted, but not required, to place a temporary hold on a securities transaction when there is a reasonable belief that the financial exploitation of a Specified Adult has occurred, is occurring, has been attempted or will be attempted.

#### COMMITTEE COMMENTS

The Committee appreciates the opportunity to submit comments in response to the Notice. The Committee generally supports the proposed amendments, and appreciates FINRA's

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<sup>5</sup> A "Specified Adult" is (A) a natural person age 65 and older or (B) a natural person age 18 and older who the firm reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests.

<sup>6</sup> A "Trusted Contact Person" means the person who may be contacted about the Specified Adult's Account in accordance with Rule 4512.

<sup>7</sup> Firms must keep 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 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 firm's reasonable belief that the financial exploitation of the Specified Adult has occurred, is occurring, has been attempted or will be attempted.

work to protect senior investors and vulnerable persons from potential financial exploitation. In addition, the Committee offers the following specific comments in response to the Notice.

**Extension of Temporary Holds on Disbursements.** The Notice requests comment on whether Rule 2165's temporary hold period should be extended for an additional 30 business days, if the firm had reported the matter to a state agency or a court of competent jurisdiction.<sup>8</sup>

The Committee generally supports the proposal to permit an extension of the temporary hold period for an additional 30 business days, if the firm had reported the matter to a state agency or a court of competent jurisdiction. As indicated in the 2019 Comment Letter, Committee member companies have found that placing a temporary hold on a specified customer's account for up to 25 business days does not provide adequate time for a firm to reach a resolution as to whether financial exploitation has occurred, is occurring, has been attempted or will be attempted. In its collective experience, Committee member companies note that investigations of financial exploitation often take longer than 25 business days; such internal investigations may take several weeks or more to complete.

Additionally, Committee member companies have found that placing a temporary hold on a specified customer's account for up to 25 business days does not provide adequate time for a state adult protective services agency or similar agency to reach a resolution as to whether financial exploitation has occurred, is occurring, has been attempted or will be attempted. FINRA's proposal would provide additional time for state adult protective services agencies, state regulators, and law enforcement to conduct through investigations.

The Committee would like to thank FINRA for taking its comments in the 2019 Comment Letter into consideration and supports FINRA's proposed extension of the temporary hold period for an additional 30 business days, subject to the conditions identified in Rule 2165.

**Extension of Temporary Holds to Transactions.** The Notice requests comment on whether Rule 2165's safe harbor should be extended to apply to transactions in securities, in addition to disbursements of funds and securities.<sup>9</sup> The Committee supports FINRA's proposal to extend Rule 2165's safe harbor to apply to transactions in securities. The Committee believes this expansion will provide additional tools to firms to combat possible financial exploitation and is a worthy change.

**Other Comments.** The Notice requests comment on whether there are alternative approaches, other than the proposed amendments, that FINRA should consider.<sup>10</sup>

As noted in the 2019 Comment Letter, Committee member companies have found that the two-business day notification requirement is an insufficient length of time in which to conduct an internal investigation which may support the reasonable belief that a Trusted Contact Person or family member is responsible for financial exploitation or is a contributing party. In addition, Committee member companies noted that there may be instances when a specified customer may benefit from a firm sharing information with other financial institutions related to the suspected financial exploitation of the specified customer, similar to the sharing of consumer information under Regulation S-P.

In response to these, and similar, comments, FINRA published a set of frequently asked questions (FAQs) to provide guidance on these topics, among others, in March 2020.<sup>11</sup>

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<sup>8</sup> See Notice at Question #3.

<sup>9</sup> See Notice at Question #2.

<sup>10</sup> See Notice at Question #1.

<sup>11</sup> These FAQs are available at <https://www.finra.org/rules-guidance/guidance/faqs/frequently-asked-questions-regarding-finra-rules-relating-financial-exploitation-seniors>.

The Committee would like to thank FINRA for taking its comments in the 2019 Comment Letter into consideration and for providing helpful FAQ guidance related to the Rule 2165 notification period and information sharing between unaffiliated financial institutions. The Committee hopes that there is an opportunity for further discussion on these topics so that firms and FINRA may work together to continue to refine the guidance on these points, as well as others.

**Coordination with the U.S. Securities and Exchange Commission ("SEC") and State Regulators.** The Notice requests comment on all aspects of the proposed amendments to Rule 2165.

Committee member companies have found that many states have adopted their own laws, rules, and regulations related to the financial exploitation of senior investors and vulnerable persons. These state requirements, along with FINRA's Rule 2165, have created a patchwork of rules and regulations related to the financial exploitation of seniors and vulnerable persons.

As a result, the Committee asks that, to the greatest extent possible, FINRA coordinate with the SEC and state regulators to address financial exploitation of seniors and vulnerable persons and create a more cohesive framework governing the prevention of financial exploitation of seniors and vulnerable persons.

**Coordination with State Adult Protective Services Agencies.** The Notice requests comment on all aspects of the proposed amendments to Rule 2165.

Committee member companies have found that state adult protective services' agencies or similar agencies often investigate reports of financial exploitation for several months. Thus, a temporary hold on a specified customer's account for up to 25 business days, or even the additional 30 business days under the proposed rule, does not always provide adequate time for a firm or state adult protective services agency or similar agency to reach a resolution as to whether financial exploitation has occurred, is occurring, has been attempted or will be attempted. Furthermore, it can be difficult to obtain an extension of a temporary hold from a state agency or a court of competent jurisdiction.

The Committee, therefore, asks that FINRA coordinate with state adult protective services agencies or similar agencies to create a more cohesive process for investigating and sharing information related to suspected financial exploitation of seniors and vulnerable persons. In doing so, firms would be able to better protect seniors and vulnerable persons from potential financial exploitation.

## CONCLUSION

The Committee appreciates the opportunity to provide these comments on the Notice. Please do not hesitate to contact Clifford Kirsch [Redacted]  
or Eric Arnold [Redacted] with  
any questions or to discuss this comment letter.

\* \* \*

EVERSHEDS  
SUTHERLAND

Jennifer Piorko Mitchell  
December 4, 2020  
Page 5

Respectfully submitted,

**EVERSHEDS SUTHERLAND (US) LLP**

BY: Clifford Kirsch (RS)  
Clifford Kirsch

BY: ERIC Arnold (RS)  
Eric Arnold

**FOR THE COMMITTEE OF ANNUITY INSURERS**

**Appendix A**

**THE COMMITTEE OF ANNUITY INSURERS**

AIG  
Allianz Life  
Allstate Financial  
Ameriprise Financial  
Athene USA  
AXA Equitable Life Insurance Company  
Brighthouse Financial, Inc.  
Fidelity Investments Life Insurance Company  
Genworth Financial  
Global Atlantic Financial Group  
Great American Life Insurance Co.  
Guardian Insurance & Annuity Co., Inc.  
Jackson National Life Insurance Company  
John Hancock Life Insurance Company  
Lincoln Financial Group  
Massachusetts Mutual Life Insurance Company  
Metropolitan Life Insurance Company  
National Life Group  
Nationwide Life Insurance Companies  
New York Life Insurance Company  
Northwestern Mutual Life Insurance Company  
Ohio National Financial Services  
Pacific Life Insurance Company  
Protective Life Insurance Company  
Prudential Insurance Company of America  
Sammons Financial Group  
Security Benefit Life Insurance Company  
Symetra Financial Corporation  
Talcott Life Insurance Company  
The Transamerica companies  
TIAA  
USAA Life Insurance Company



**Wells Fargo & Company**  
420 Montgomery Street  
San Francisco, California  
wellsfargo.com

December 3, 2020

**Via E-mail:** *pubcom@finra.org*

Ms. Jennifer Piorko Mitchell  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

**RE: Regulatory Notice 20-34: Proposed Amendments to FINRA Rule 2165 and Retrospective Rule Review Report**

Dear Ms. Mitchell:

Wells Fargo & Company, together with its affiliates and subsidiaries (collectively, “Wells Fargo”), appreciates the opportunity to comment on the Financial Industry Regulatory Authority’s (FINRA) Proposed Amendments to FINRA Rule 2165 and Retrospective Rule Review Report, set forth in Regulatory Notice 20-34 (the “Notice”).<sup>1</sup>

Wells Fargo is a diversified, community-based financial services company with \$1.9 trillion in assets and approximately 259,000 team members, which provides banking, investment and mortgage products and services, as well as consumer and commercial finance. Our broker-dealer<sup>2</sup> and asset management affiliates comprise one of the largest retail wealth management, brokerage and retirement providers in the United States, helping millions of customers of varying means and investment needs obtain the advice and guidance they need to achieve financial goals.

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<sup>1</sup> Regulatory Notice 20-34, Proposed Amendments to FINRA Rule 2165 and Retrospective Rule Review Report (October 2020). <https://www.finra.org/sites/default/files/2020-09/Regulatory-Notice-20-34.pdf>

<sup>2</sup> Wells Fargo Advisors (WFA) is a dually registered broker-dealer and investment advisor that administers approximately \$1.5 trillion in client assets. It employs nearly 13,300 full-service financial advisors in branch offices in all 50 states and 5,431 licensed bankers in retail bank branches across the United States. WFA is a non-bank affiliate of Wells Fargo & Company.

*Jennifer Piorko Mitchell*  
*December 3, 2020*  
*Page 2*

## **I. BACKGROUND**

In October of 2020, FINRA issued this Notice seeking comments in response to proposed amendments to FINRA Rule 2165 (Financial Exploitation of Specified Adults), which would permit a firm to place a temporary hold on a securities transaction (in addition to the existing ability to place a temporary hold on a disbursement of funds or securities) if there is a reasonable belief that financial exploitation of a Specified Adult has occurred, is occurring, has been attempted, or will be attempted, and extend any temporary hold period for an additional 30 business days if certain conditions are met.

## **II. DISCUSSION**

Wells Fargo is supportive of FINRA's proposed amendments to Rule 2165 to permit a firm to place a temporary hold on a transaction when there is a reasonable belief that the customer is being financially exploited, and extend any temporary hold period for an additional 30 business days if the member firm had reported the matter to a state agency or a court of competent jurisdiction.

As we noted in our [comment letter](#) in our response to Regulatory Notice 19-27, Wells Fargo believes senior investors suffer financial exploitation when their account is liquidated under fraudulent circumstances, as the sale of long-held assets could trigger adverse and unwanted tax consequences. The proposed extension of Rule 2165 to cover transactions would provide additional protection for investors. Wells Fargo also believes FINRA's amendment to permit extension of a temporary hold under Rule 2165 for an additional 30 business days would provide member firms with additional time to resolve matters and for Adult Protective Service agencies, state regulators and law enforcement to conduct thorough investigations of, and act in response to, claims of reported financial exploitation.

The COVID-19 pandemic has highlighted two additional areas where FINRA can amend its rules to better assist Specified Adults, namely, seniors and senior investors who have been impacted by COVID-19. According to the [Centers for Disease Control and Prevention](#) (CDC), as a group, seniors have had the highest mortality rate related to COVID-19, and consequently have suffered from societal restrictions and closures enacted as a response to the pandemic. Some believe surviving COVID-19 can have debilitating lingering effects on older persons. Wells Fargo believes that, in light of the impacts the COVID-19 pandemic has had on the economy and senior investors, FINRA should take a closer look at diminished capacity issues and consider extension of the Rule 2165 safe harbor to apply where there is a reasonable belief that the investor has an impairment that renders the individual unable to protect his or her own interests, irrespective of whether there is evidence the customer may be the victim of financial exploitation by a third party.

*Jennifer Piorko Mitchell*

*December 3, 2020*

*Page 3*

FINRA Rule 4512 allows firms to obtain the name of a trusted contact person for a customer account as a resource for the firm in administering the customer's account and responding to possible financial exploitation. In the Notice, FINRA recognizes the reality that many clients have not named a trusted contact to date. Where investors have not had the foresight or opportunity to name a trusted contact in writing, Wells Fargo notes that a number of states currently permit firms, in circumstances where financial exploitation may be suspected, to contact a person "reasonably associated" with the customer in question. Wells Fargo believes FINRA also should give member firms the flexibility to contact someone reasonably associated with the account in such circumstances. Coupled with expanding Rule 2165 to aid in situations where diminished capacity is suspected, these changes could help protect a senior investor suffering from diminished capacity if a trusted contact person is not provided for the account, or if the trusted contact person is suspected of exploiting the customer. We urge FINRA to take a second look at these concerns in light of the real world challenges exacerbated by the current COVID-19 environment.

### III. CONCLUSION

Wells Fargo appreciates the opportunity to respond to FINRA's proposed amendments to Rule 2165. If you would like to discuss this issue further or need additional information, please contact me at [Redacted], or Carl Tugberk, Head of Wealth and Investment Management Public Policy for Wells Fargo & Company, at [Redacted]

Sincerely,



Ron Long  
Head of Aging Client Services

Leonida Manabat Comment On Regulatory Notice 20-34

Leonida Manabat

n/a

I would appreciate if you can include in your protection and security program of senior investors from other countries outside the US territories. Some US traders/brokers market investors from other countries...some of these investors fall into brokers and account managers who scam on their dealings and transactions.



## PUBLIC INVESTORS ADVOCATE BAR ASSOCIATION

1225 West Main Street, Suite 126 | Norman, OK 73069

Toll Free (888) 621-7484 | Fax (405) 360-2063

[www.piaba.org](http://www.piaba.org)

December 4, 2020

Jennifer Piorko Mitchell  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506  
[pubcom@finra.org](mailto:pubcom@finra.org)

**RE: Regulatory Notice 20-34**  
**Request for Comment on Retrospective Rule Review (Rule 2165 – Senior Investors)**

Dear Ms. Piorko Mitchell:

I write on behalf of the Public Investors Advocate Bar Association<sup>1</sup> (“PIABA”), an international bar association comprised of attorneys who represent investors in securities arbitrations. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and industry misconduct. Our members and their clients have a strong interest in rules promulgated by the Financial Industry Regulatory Authority (“FINRA”) relating to investor protection.

PIABA members frequently represent senior investors, and we are particularly concerned with enhancing protections for this vulnerable population. PIABA previously commented on FINRA Regulatory Notices 15-37 and 19-27, which included a variety of senior protection proposals. Regulatory Notice 20-34 (“RN 20-34”) seeks comment on proposed revisions to one of those protections, FINRA Rule 2165, which creates a “uniform national standard” for FINRA-registered members and associated persons regarding certain tools to help prevent financial exploitation of specified adults, including a “safe harbor” provision allowing firms to place a temporary hold on a disbursement of funds or securities when there is suspected misconduct. Based on FINRA’s retrospective review, FINRA proposes extending the time of the permissible hold period under Rule 2165 and to allow temporary holds on securities transactions (not just disbursements).

### PIABA Supports Enhanced Protections – With Caution

PIABA deeply appreciates FINRA’s recognition that our elder population is particularly vulnerable to financial abuse. Abuse by a family member or friend is, tragically, common throughout the United States. The “safe harbor” protections of Rule 2165 give brokers important tools to help their clients and prevent potential abuse by third-party bad actors. The results of FINRA’s member survey described in RN 20-34 give important insights for improving these tools.

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<sup>1</sup> Formerly known as the Public Investors Arbitration Bar Association.

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#### Officers and Directors

President: David P. Meyer, OH  
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Andrew J. Stoltmann, IL  
Robin S. Ringo, *Executive Director*

Ms. Jennifer Piorko Mitchell  
December 4, 2020  
Page 2

However, PIABA is also concerned with investor autonomy and protecting senior investors *from member firms* potentially misusing the expanded hold periods and extension of holds to securities transactions.

### State Law Alignment Considerations

RN 20-34 references the Model Act to Protect Vulnerable Adults from Financial Exploitation, first promulgated by the North American Securities Administrators Association (“NASAA”) in September 2015. To date, 28 states have enacted legislation or regulations based on this Model Act.<sup>2</sup> Several additional states enacted statutes prior to the Model Act that include at least some of its elements.<sup>3</sup> The majority of these states follow the Model Act’s definition of “vulnerable adult” as including anyone age 65 or older, as well as other provisions: the 25-business day total time frame for permissive delays of disbursements, mandatory record keeping and state access to such records, mandatory reporting of suspected abuse to specified state agencies, and permissive notification to certain previously identified individuals (provided that they are not the suspected abuser).<sup>4</sup>

According to RN 20-34, 16 of the 31 states with laws that allow investment advisers or broker-dealers to place some form of hold on suspicious requests extend to securities *transactions within an account*, as well as distributions of funds or securities out of an account. This is different than the Model Act, which is limited to disbursements only. Furthermore, an extension of the hold time to 30 business days would go beyond the Model Act’s total 25-business day hold period for permissive delays.

In its comment to RN 19-27, PIABA cautioned FINRA against substantive changes to Rule 2165 that might conflict with enacted state law.<sup>5</sup> However, it appears that states recently adopting some version of the Model Act and now about half of the states with such laws prefer the extension to securities transactions as well as distributions. The firm feedback noted in RN 20-34 suggests firms may benefit from increased permissible hold periods with appropriate safeguards.

### Mandatory Reporting Requirement May Dissuade Misuse of Rule 2165

PIABA is cautious regarding the proposed extension to securities transactions, as there could be significant monetary losses due to the failure to execute a legitimate purchase or sell instruction. PIABA is also concerned about potential misuse of the extended 30-business day hold period, for the same reason of market pricing changes, as well as potential delays in transferring an account to another brokerage firm. Bad faith conduct by the member firm to delay for purpose of financial benefit – for example, generating another month of commissions or fees – is not only frustrating but may be costly to an investor. A potential safeguard against such conduct is to add the requirement in the FINRA Rule 2165 that the member firm *must report* the suspected abuse to the appropriate state Adult Protective Services and state securities regulator. Most states adopting the Model Act *already have mandatory* reporting requirements to promptly notify state Adult Protective Services and the commissioner of securities (e.g., the state

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<sup>2</sup> <http://serveourseniors.org/about/policy-makers/nasaa-model-act/update>

<sup>3</sup> See e.g., Washington State, RCW 74.34.215 (Financial Exploitation of Vulnerable Adults) (allowing permissive temporary holds on disbursement of funds).

<sup>4</sup> For a detailed comparison, see Darlene Pasieczny, *States Adopting NASAA’s Model Act to Protect Vulnerable Adults from Financial Exploitation (Mandatory and Permissive Conduct by Financial Advisors)*, PIABA Bar Journal, vol. 26, no. 2 (October 2019). Since the article’s submission for publication, several additional states adopted versions of the Model Act or adopted revised pending versions: Arizona, California, Florida, New Hampshire, New Jersey, Rhode Island, and West Virginia.

<sup>5</sup> State law protections following the Model Act apply to “qualified individuals” defined as any “agent, investment adviser representative or person who serves in a supervisory, compliance, or legal capacity for a broker-dealer or investment adviser.” Thus, these state laws generally apply to a broader category of individuals, but overlap with FINRA Rule 2165 for FINRA-registered members and associated persons.

Ms. Jennifer Piorko Mitchell  
December 4, 2020  
Page 2

securities regulator) upon reasonable belief that financial exploitation of an eligible adult may have occurred, may have been attempted, or is being attempted.

Therefore, PIABA recommends that FINRA add to Rule 2165 the general requirements that the member firm: (1) update its written supervisory manuals to include training and review transactions suspected of elder abuse; (2) include in its retained records documentation of the firm's reasonable efforts to quickly investigate the matter; and (3) file a report with the appropriate Adult Protective Services agency and state regulator as soon as reasonably practical but no later than seven business days from the initial hold period.

By including more express documentation and a mandatory reporting requirement in the FINRA rules, no additional burden is put on the firms already making such reports in compliance with state law, and firms may be dissuaded from misuse of extending permissive hold periods.

#### **Additional Protections Should Be Considered**

PIABA urges FINRA to continue to consider the following improvements to FINRA rules and practices:

- Amending the Sanctions Guidelines to add as a principal consideration for enhanced sanctions whether a victimized customer is a "specific adult," i.e., a person 65 or older or a person 18 or older who the member firm reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interest.
- Mandating heightened supervision for the marketing and sale of particular products or investment strategies to seniors that may have inherently higher risks, such as annuities, structured notes, private placements, and other illiquid, complex or "alternative" products.
- Emphasizing in Notice to Members and the Arbitrator's Guide that an expedited case (designated expedited based on age or illness) scheduled for an evidentiary hearing beyond six months from the Initial Prehearing Conference *should be the exception and only granted for good cause shown or stipulation of the parties.*
- Regularly reviewing and improving the legibility and ease of navigation of the FINRA website for senior investors to find the Securities Helpline for Seniors, the Investor Complaint Center, and generally, information about Arbitration and Mediation.

#### **Conclusion**

PIABA encourages FINRA to continue to work in tandem with NASAA and state regulators, who are positioned to understand the needs of their particular aging populations. PIABA also applauds FINRA for its continued review of its rules and guidance to improve investor protections. We thank you for the opportunity to comment on the proposed rule and urge FINRA to consider the issues set forth above.

Sincerely,



David P. Meyer  
President



Insured Retirement Institute  
1100 Vermont Avenue, NW | 10<sup>th</sup> Floor  
Washington, DC 20005

t | 202.469.3000

f | 202.469.3030

[www.IRionline.org](http://www.IRionline.org)  
[www.myIRionline.org](http://www.myIRionline.org)

December 4, 2020

Jennifer Piorko Mitchell  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

Re: Regulatory Notice 20-34

Dear Ms. Piorko Mitchell:

On behalf of the Insured Retirement Institute (IRI)<sup>1</sup>, we thank you for the opportunity to comment on the proposed amendments to FINRA Rule 2165 and Retrospective Rule Review Report related to the enhancement of protection of senior investors. We write today in support of the proposed amendments.

Enhancing the protection of seniors and other vulnerable adults against financial exploitation is a national imperative for public policymakers. Financial abuse costs older Americans between \$2.9 billion and \$36.5 billion annually according to a Consumer Financial Protection Bureau [report](#) issued in February 2019. The [average loss per incident of financial exploitation is estimated to be \\$120,000](#), a figure which happens to align with the average amount Americans have saved for retirement. As such, financial exploitation can erase a lifetime of savings and leave a retiree or pre-retiree in financial ruin, compounding the retirement income crisis our nation is currently facing. With the population of older Americans expected to double in size to nearly 84 million citizens by 2050, there needs to be a concerted effort to combat financial exploitation.

IRI has a long history of supporting legislative and regulatory policies that would provide more resources to protect seniors and other vulnerable investors from financial exploitation. In fact, IRI's 2020 [Federal Retirement Security Blueprint](#), which outlines our public policy objectives for the year, calls for the

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<sup>1</sup> The Insured Retirement Institute (IRI) is the leading association for the entire supply chain of insured retirement strategies, including life insurers, asset managers, and distributors such as broker-dealers, banks, and marketing organizations. IRI members account for 90 percent of annuity assets in the U.S., include the top 10 distributors of annuities ranked by assets under management, and are represented by financial professionals serving millions of Americans. IRI champions retirement security for all through leadership in advocacy, awareness, research, and the advancement of digital solutions within a collaborative industry community. Learn more at [www.irionline.org](http://www.irionline.org).

December 4, 2020

Page 2 of 2

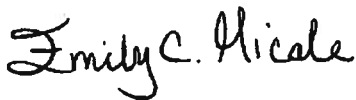
adoption of policies aimed at protecting seniors, including an increase in the amounts appropriated to currently underfunded federal programs supporting state Adult Protective Services agencies. IRI was also a leading advocate for the enactment of the *SeniorSafe Act* (signed into law in May 2018), which enables and encourages financial advisors to report suspected financial abuse to better help protect their clients.

IRI understands and appreciates that the proposed amendments to FINRA Rule 2165 (Financial Exploitation of Specified Adults) were developed based on the results of FINRA's retrospective review of the effectiveness and efficiency of its senior protection rules. The proposed amendments to Rule 2165 to extend the hold period and to allow temporary holds on securities transactions will better enable our members to prevent the financial exploitation of vulnerable Americans. IRI recommended these modifications in comments submitted to FINRA in November of 2016, and we commend FINRA for proposing to incorporate these important changes into the rules at this time.


IRI proudly advocates for the enactment of common-sense solutions that will help ensure that Americans can have a secure and dignified retirement. Rules designed to protect Americans against bad actors looking to defraud them out of their savings are, in our view, critical to the advancement of retirement security. As such, we are proud to support the proposed amendments to FINRA Rule 2165. We welcome the opportunity to work with you as FINRA considers other new ways to increase protections against the financial exploitation and abuse of senior citizens.

Thank you again for the opportunity to provide these comments. If you have questions, or if we can be of any further assistance in connection with this important regulatory effort, please feel free to contact the undersigned at [Redacted] or [Redacted]

Respectfully submitted,



Emily Micale  
Director, Federal Regulatory Affairs



John Jennings  
Assistant Director, Government Affairs



**VIA ELECTRONIC MAIL: [pubcom@finra.org](mailto:pubcom@finra.org)**

December 03, 2020

Ms. Jennifer Piorko Mitchell  
Office of the Corporate Secretary  
The Financial Industry Regulatory Authority, Inc.  
1735 K Street, NW  
Washington, DC 20006-1506

**Re: Regulatory Notice 20-34: Senior Investors – Proposed Amendments to FINRA Rule 2165 and Retrospective Rule Review Report.**

Dear Ms. Mitchell,

Cambridge Investment Research, Inc. (“Cambridge”) appreciates the opportunity to comment on Regulatory Notice 20-34 regarding Senior Investors and the Proposed Amendments to FINRA Rule 2165. In Cambridge’s response to Regulatory Notice 19-27, Cambridge agreed with FINRA’s view that the protection of senior investors from financial exploitation is a top priority and that many aspects of FINRA Rule 2165 Financial Exploitation of Specified Adults (the “Rule”) are effective.

Cambridge believes FINRA’s proposed changes will enhance senior investor protection, but requests FINRA further consider certain recommendations provided by Cambridge in its response to Regulatory Notice 19-27 and include additional modifications to FINRA’s rules. Specifically, Cambridge asks that FINRA:

1. develop a mechanism to give member firms a means to clearly identify and differentiate complaints received as a consequence of compliance with the Rule; and
2. add safe harbor provisions specifically related to actions taken by member firms pursuant to the Rule.

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Securities offered through Cambridge Investment Research, Inc., a broker-dealer, member FINRA/SIPC. Cambridge Investment Research, Inc. and Cambridge Investment Research Advisors, Inc., a Registered Investment Adviser, are wholly-owned subsidiaries of Cambridge Investment Group, Inc.  
V.CIR.0814

### Reporting Mechanism

Cambridge believes the holds authorized by Rule 2165(b) could be mischaracterized under the current rule framework and that additional steps should be taken at this time. Cambridge anticipates that persons negatively impacted by, or those whose malicious efforts may be thwarted by, a member firm's steps to prevent possible financial exploitation may complain about such holds, thus triggering a reportable event. As stated in Cambridge's earlier response, the required disclosure framework, specifically those associated with reporting allegations of theft or misappropriation, may mischaracterize complaints relating to Rule 2165(b) holds. To avoid any mischaracterization of complaints following such holds, Cambridge believes FINRA should include additional mechanisms to accurately convey the purpose of the member firm's actions because a hold on a customer's account in an effort to protect that vulnerable person from financial exploitation is neither theft nor misappropriation.

Further, increasing the length of the hold period permitted under Rule 2165 may lead to an increase in the number of complaints. Such reported complaints resulting from Rule 2165 compliance measures will be indistinguishable from complaints alleging theft or misappropriation as a result of other circumstances. Cambridge believes that the threat of such complaints may have a chilling effect on a member firm's use of such measures under the Rule.

Cambridge is not asking for a mechanism to stifle complaint reporting, but rather a mechanism to accurately depict complaints received in a manner which clearly denotes the context of the situation. Again, Cambridge believes the current problem code framework may penalize a member firm's efforts to reasonably protect those investors who may have fallen or will fall subject to wrongful financial exploitation. Specifically, the lack of a unique problem code precludes a distinction between complaints based on compliance with Rule 2165 and other conduct. It is the inability to distinguish among these types of complaints that potentially creates a disincentive to placing a Rule 2165 hold on a customer account. Cambridge believes that the addition of new problem codes, and language defining those problem codes, would greatly bolster Rule 2165 and encourage its use.

### Safe Harbor

Cambridge believes a safe harbor protecting member firms and registered representatives from customer actions as a result of steps taken by a member firm pursuant to this Rule furthers the Rule's intent. FINRA could accordingly amend other rules to eliminate the negative impacts member firms and/or registered representatives may encounter when complying with the Rule.

As stated before, per Rule 3260(b), member firms and registered representatives may not exercise any discretionary power over customer funds without first obtaining the prior written authorization of that customer specifically granting that power to a stated individual or individuals. A targeted hold, specific to the customer, the customer's account, or the customer's agent may appear as a form of discretion, which neither member firms nor registered representatives seemingly have authority under FINRA rules to exercise at this time. Cambridge recommends FINRA consider amending Rule 3260, creating an exception under 3260(d), providing member

firms and registered representatives actual authority to effectuate such a hold and to engage in such proposed protective activities.

Cambridge believes that the potential ramifications member firms and/or registered representatives could face after imposing transaction restrictions may weigh against exercising such an option. The possibility of changes in a security's pricing during the hold and the obligations member firms and registered representatives have regarding best execution, in addition to others, are serious concerns. Cambridge still believes implementation of such a transaction hold without a safe harbor would place member firms and registered representatives on the horns of a dilemma. Essentially, member firms and/or registered representatives would have to decide whether to employ the transaction restriction and possibly face complaints, arbitration or even civil actions from customers, their heirs or agents, or to refrain from employing the transaction restriction and possibly face regulatory scrutiny and the fallout from customer loss for not blocking the transaction under these circumstances. Cambridge believes it would greatly foster the use of such protective transaction restrictions under Rule 2165 to have such a safe harbor to rely upon.

Cambridge is happy to discuss any of the comments or recommendations in this letter.

Respectfully submitted,

*// Seth A. Miller*

Seth A. Miller  
General Counsel  
Executive Vice President, Chief Risk Officer



December 4, 2020

via email: [pubcom@finra.org](mailto:pubcom@finra.org)

Jennifer Piorko Mitchell  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

RE: Regulatory Notice 20-34: Proposed Amendments to FINRA Rule 2165 and Retrospective Rule Review Report

Dear Ms. Mitchell,

In its Regulatory Notice 20-34 ("RN 20-34"), the Financial Industry Regulatory Authority, Inc. ("FINRA"), solicited comments regarding a proposal to amend Rule 2165 (Financial Exploitation of Specified Adults) (hereinafter "Proposed Amendment") to extend the time firms may withhold distributions of suspected elder financial abuse victims and expand the scope to include the withholding of securities transactions.

RN 20-34 proposes to amend Rule 2165 to allow member firms to extend a temporary hold for an additional 30 business days when they have reported their concerns to the appropriate state agencies. Secondly, RN 20-34 proposes amending the rule to include a temporary hold on securities transactions.

Currently, Rule 2165 allows a member firm to place a temporary hold on disbursements of funds or securities from a specified adult customer's account for up to 25 business days when there is reasonable belief that financial exploitation of a specified adult has occurred, is occurring, has been attempted, or will be attempted, and where the firm has taken appropriate steps, including opening an internal investigation, notifying the proper parties to the account of the hold, and referring the matter to the applicable agencies in the state where the customer resides.

Commonwealth Financial Network® is an independent broker/dealer and an SEC registered investment adviser with home office locations in Waltham, Massachusetts, and San Diego, California, and more than 2,000 registered representatives who are independent contractors conducting business in all 50 states. Commonwealth's purpose is to make a profound difference in our world by helping people. The firm is inspired by empowering the goals and dreams of the entire Commonwealth community.

Commonwealth welcomes and appreciates the opportunity to comment on the Proposed Amendment. The impact of financial exploitation on investors is emotionally, psychologically, physically, and financially devastating. Financial exploitation is a public health issue, and studies have shown that victims of all forms of elder abuse, including financial exploitation, have an increased risk of death. Firms have a duty to protect investors, especially those who are most vulnerable.

Commonwealth is sensitive to the fact that placing a hold on a customer's disbursement is, to say the least, a significant event; however, it doesn't hesitate to do so, when the facts and circumstances warrant it, to protect a senior or vulnerable investor.



### **Hold Period**

Commonwealth supports the extension of the temporary hold for an additional 30 business days as proposed.

In some cases, 25 business days may be enough to resolve an issue of exploitation; however, in our experience, most circumstances require additional time to seek support from one or more state agencies, law enforcement, or regulators and to engage trusted contacts or family members. In the event that Adult Protective Services may not be willing or able to accept a referral, firms need time to engage other agencies. The additional 30 business days will be beneficial in our efforts to ensure that we are exhausting all avenues in an attempt to protect these individuals.

Our efforts don't stop at alerting the proper authorities. Depending on the case, we rely on leveraging the 314(b) information-sharing provision of the PATRIOT Act to gain a more thorough understanding of the other side of a completed or attempted transaction. Some 314(b) participating financial institutions, due to volume or resources, may not respond for 30 days. The resulting information can be critical in determining if there is financial exploitation and in alerting the receiving financial institution or informing the proper authorities of its existence. Commonwealth has found in several reported cases of suspected financial exploitation that the actual exploitation occurred outside of our purview at a separate financial institution. Our advisors' intuition and our ability to leverage Rule 2165 in conjunction with 314(b) have allowed us to take additional measures to ensure the welfare of clients. Having the time to properly pursue this information and knowledge is pivotal to a thorough investigation.

Commonwealth fully supports the extension of the hold period and believes the additional 30 business days will allow the firm to perform a more robust investigation. We believe there should be some additional remedy when the hold period ends. Faced with the end of the hold period, in situations where the firm has not been able to resolve the issue, it has two very undesirable options: to continue to allow suspected financial exploitation or de-market the customer. While the Senior Hotline is an incredible resource for senior investors, it has been our experience that the hotline is limited in terms of assisting member firms in resolutions with cases. Commonwealth suggests that FINRA continue to collaborate with NAPSA, whose members are key to member firms when these referrals are made; that it continue to work with NASD to encourage state securities regulators to enhance existing laws to further protect seniors as well as provide support to member firms when cases are referred; and also that it engage with law enforcement agencies, including FinCEN. In addition, Commonwealth also suggests that FINRA consider creating regional committees to include member firms, local law enforcement, and local agencies combatting exploitation to collaborate on cases and make recommendations on additional tools and resources to combat financial exploitation.

### **Transactions in Securities**

Commonwealth supports the expansion of temporary holds on transactions in securities as proposed. As noted in RN 20-34, 16 states already allow firms to place a hold on securities transactions.

Currently, even if a firm places a temporary hold on a disbursement of funds, it must allow any related sales of securities. There is no way to un-ring the bell once those trades have been effected. Seniors and



vulnerable adults holding positions with large gains can be subject to significant tax consequences resulting from the sales.

In closing, Commonwealth appreciates the opportunity to comment on the Proposed Amendment. We look forward to engaging with FINRA to develop additional tools and resources to further protect the senior and vulnerable adults in our communities.

If you should have any questions or would like additional information on our comments, please do not hesitate to call me at [Redacted]

Sincerely,

A handwritten signature in blue ink, appearing to read "H. Murphy", written over a light blue horizontal line.

Heather Murphy  
Director, AML Compliance  
Commonwealth Financial Network®

Wendy Norcross Comment On Regulatory Notice 20-34

Wendy Norcross

none

I am a suburban daughter who watched and felt helpless in stopping siblings from financially exploiting my parents. I had POA and was their health care agent. I warned their out of state financial advisor that my parents were targets of financial exploitation. Less than three months later, the advisor facilitated over 300K being diverted from my mother as an inherited IRA due to my fathers passing - the beneficiary designation was changed by the siblings, to the siblings, 9 days before my fathers death. My father had Parkinson's and was cognitively impaired - my mother had Alzheimers. I would have had to take this to court to fight for my mother. Please do what you can to protect this population and make it far more difficult for this type of exploitation to continue. Many thanks for the work that you do!

December 4, 2020

**Via ELECTRONIC Mail (pubcom@finra.org)**

Jennifer Piorko Mitchell  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

**Re: Regulatory Notice 20-34: Comment on FINRA's Proposed Amendments to Rule 2165 and Retrospective Rule Report**

Dear Ms. Mitchell:

Please accept this submission as MML Investors Services, LLC's ("MMLIS") comment in response to FINRA's Regulatory Notice 20-34: Proposed Amendments to FINRA Rule 2165 and Retrospective Rule Report ("RN 20-34" or the "Notice.")

MMLIS is MassMutual's retail broker-dealer and is headquartered in Springfield, Massachusetts. The firm's approximately 8,500 registered representatives offer a variety of investment products and services to retail clients, including mutual funds and variable products.

**Background**

RN 20-34 summarizes the feedback that FINRA received from firms related to its August 2019 Regulatory Notice seeking feedback from firms regarding their observations of the recent implementation of two FINRA rules designed to protect senior investors – Rules 2165 and 4512. Rule 2165 permits a broker-dealer to place a temporary hold on a specified adult's account if the member reasonably believes that financial exploitation has occurred, is occurring, has been attempted or will be attempted. The rule defines specified adult as "(A) a natural person age 65 and older or (B) a natural person age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests."<sup>1</sup> Under the current rule, a firm may place a temporary hold on disbursements for up to 25 business days.<sup>2</sup>

As a result of the feedback received from firms and various other groups in response to the Regulatory Notice and a separate survey, FINRA has proposed two key changes to Rule 2165. First, FINRA proposes to amend Rule 2165 to give firms the ability to extend a temporary hold for an additional 30 days when a firm has reported the matter to a state agency or a court of competent jurisdiction. Second, FINRA proposes to extend the scope of the safe harbor under the rule to enable firms to place temporary holds on a

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<sup>1</sup> FINRA Rule 2165.

<sup>2</sup> *Id.*

transaction in securities "where there is a reasonable belief that the customer is being financially exploited."<sup>3</sup>

**Comment from the Firm**

MMLIS commends and fully supports FINRA on its most recent rule proposal. As the firm outlined in its comment letter dated October 8, 2019 in response to RN 19-27, firms will require additional tools to assist them in their efforts to protect senior investors from exploitation as the investing public ages. The firm advocated for – and continues to believe – that Rule 2165's safe harbor should be extended to apply to transactions in securities. As referenced in that letter, exploitation in variable annuities can be challenging and devastating to an investor as the investor can incur significant financial harm through the loss of an income producing benefit, loss of a death protection benefit, unanticipated tax consequences, or large surrender charges when inappropriate transactions are executed. FINRA's extension of the safe harbor to transactions will go a long way towards avoiding the harm that these investors could face if they encounter a bad actor, particularly in scenarios that are compounded by market volatility.

Similarly, MMLIS is supportive of FINRA's proposal to extend the period of time for the temporary hold to allow for an additional 30 days where the firm has reported the matter to a state regulatory agency or court of competent jurisdiction. As we noted in our prior letter, there have been occasions where the firm has not been able to reach a state regulator who understands and is willing to consider granting an extension to the initial hold period. In these instances, state securities regulators are unclear as to their role in the Rule 2165 process and are wary to grant extensions. Or in the alternative, the state regulator who receives the report has resource constraints and it takes weeks to reach someone who is willing to discuss the matter with the firm. This extension of time will not only grant the firm additional time to continue to educate the investor regarding the scam, but also will allow the firm to fully educate the state agency on the issues and hopefully facilitate a resolution that will protect and benefit the investor in the end.

**Conclusion**

MMLIS appreciates the opportunity to provide its comment to this proposal to amend Rule 2165. If you should have any further questions regarding this comment, please do not hesitate to contact me.

Best regards,



Courtney Rogers Reid  
Lead Counsel, Broker-Dealer and Investment Adviser Practice Group  
[Redacted]

Cc: Brett Lassoff

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<sup>3</sup> FINRA Regulatory Notice 20-34

## Comments to FINRA Regulatory Notice 20-34

The Philadelphia Financial Exploitation Prevention Task Force is pleased to comment on FINRA's Regulatory Notice 20-34 (Propose to Amendments to FINRA Rule 2165 and Retrospective Rule Review Report). It is clear from the recommendations that protection of senior investors remains a top priority for FINRA. We would like to thank FINRA for all their great work in this area. Here are our comments:

### **Hold Period**

The Task Force agrees with FINRA's recommendation to extend the hold period an additional 30 business days. We suggested 60 days in our initial comments but we are very pleased with the proposed total of a 55 business day hold extension. The survey data from your members supports this extension as well as data from Adult Protective Services programs (APS). The latest data submitted to the National Adult Maltreatment Reporting System (NAMRS) indicates the average investigation duration of all reported cases is 52.6 days. (1) Recognizing that financial exploitation investigations are often more complicated and time consuming, we are grateful for the additional days as a starting point with the ability to revisit as more data become s available.

We would like a clarification on the wording in the last paragraph of the Hold Period which states "FINRA is proposing amending Rule 2165 to permit extending a temporary hold for an additional 30 business days if the member firm had reported the matter to a state agency or court of competent jurisdiction." We are commenting on the notable absence of law enforcement from the equation as some cases are reported to law enforcement without the involvement of APS and sometimes it is local and not state law enforcement that is involved.

The Task Force again notes the diversity in APS programs and difficulty in obtaining an extension of a temporary hold from an APS agency or a court. The Task Force recommends that FINRA partner with NAPSAs to bring awareness and solutions to this problem as NAPSAs have developed a new protocol and forms that addresses this matter.

### **Transactions in Securities**

The Task Force is pleased to see that FINRA is recommending that holds should be extended to matters beyond disbursements. We salute FINRA for proposing the creation of the first uniform national standard for placing holds on transactions related to suspected financial exploitation. This is an important step in the protection of investors and further demonstrates FINRA's leadership and commitment in protecting vulnerable investors.

### **Cognitive Decline or Diminished Capacity**

The Task Force reiterates our position that Rule 2165 be expanded to include temporary holds on transactions when a firm is concerned about customers managing their own assets as opposed to only when there is financial exploitation by a third party. FINRA has decided not to propose to extend Rule 2165 in this scenario and cites lack of expertise and too much discretion on part of the members as well as impeding on the autonomy of the investor as their major concerns. We share some of the concerns and recognize that this is a sensitive and complicated matter; however, we think this is overshadowed by the potential harm to investors if action is not taken.

Financial service professionals are in a unique position of often being the first and only place to detect the potential of financial harm. We all know how quickly wealth can be lost and the devastating effect this has on older investors who are not in a position to reclaim the losses. We believe that through experience and education offered by FINRA as well as many other entities that many members have or can get the required expertise to recognize the red flags and the hold would enable the investor to be protected while an investigation is completed. We think the existing protections in the process put in by FINRA and the individual firms mitigate the discretion that individuals would have.

Many studies link cognitive ability to financial decision making. Data reported by APS programs report that over 31% of victims of financial exploitation suffer from cognitive issues. (2) A 2019 study in Health Economics concluded that people in the early stages of Alzheimer's Disease (AD) face a heightened risk of damaging financial outcomes. (3) Stiegel reported in 2012 that people in early stages of Alzheimer's disease are more likely to be susceptible to financial exploitation and fraud by others. (4) Wood and Lichtenberg stated in 2017 that "individuals who are mildly impaired prior to AD are the perfect victims as they have control of their assets but have impairment that may not be recognized and have broad exposure to the community." (5)

We think it is critical that the ability to hold and report be maximized here to protect vulnerable investors. We believe the costs and benefits described in the sections related to the Hold Period and Transactions in Securities are germane here as are the protections described in the respective sections.

#### **FINRA Rule 4512**

The requirement of member firms to obtain the name of and contact information for a trusted contact person upon the opening of a non-institutional customer's account or when updating account information for a non-institutional account is a great resource for all of us in investor protection and the benefits are obvious. We expressed that the usage rate was rather low in the first year and still would like to see a higher usage. Information in the regulatory notice was unclear as it was stated that most survey respondents reported a 25 % or less of the firm's existing or new clients had provided trusted contact information.

We recommended that FINRA look at other industries like the long-term care insurance industry that have similar requirements and a much higher success rate. One practice is to create a check box asking if you would like your emergency contact be your trusted contact.

We are recommending more specific ideas be provided such as FINRA publishing stories of how the provision has helped protect investors and perhaps a video discussion with the trusted contact and client which proved instrumental in stopping exploitation and fraud.

We would also like to see the FINRA Foundation create an annual campaign to promote the use and benefits of having a trusted contact person on the account. Older investors are used to the Medicare open enrollment period annually and this could be done and would be much easier to navigate.

### **Direct Fund Accounts**

As we mentioned in our previous comment letter dated October 7, 2019, we would very much appreciate FINRA advocating on behalf of member firms with the US Securities and Exchange Commission (SEC) in order to harmonize temporary hold requirements as it pertains to open-end investment companies ("mutual funds") and their transfer agents. In an SEC No Action Letter to the Investment Company Institute (ICI) dated June 1, 2018 (6), the ICI astutely identified a gap in protection of mutual fund investors where shareholder accounts are held directly with the mutual fund and serviced by the fund's transfer agent ("direct-at-fund" accounts). While the transfer agent may suspect financial exploitation, under current law, when a fund's transfer agent suspects financial exploitation in a direct-at-fund account, it cannot lawfully delay the disbursement of redemption proceeds while it investigates the situation. This is because the transfer agent is acting as an agent of the fund, and Section 22(e) of the Act prohibits a mutual fund from delaying the disbursement of redemption proceeds for more than seven days. (7)

The SEC agreed with the ICI and granted no-action relief to registered open-end investment companies and their SEC-registered transfer agents if, in the limited circumstances and subject to the conditions described in the ICI letter, the transfer agent, acting on behalf of the mutual fund, temporarily delays for more than seven days the disbursement of redemption proceeds from the mutual fund account of a Specified Adult held directly with the transfer agent based on the transfer agent's reasonable belief that financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted. There were nine conditions outlined in the ICI letter, which are substantially similar the requirements outlined in FINRA Rule 2165 and 4512.

Broker-dealers who are members of our task force have had experiences with investment companies and their affiliated transfer agents who have chosen not to adopt policies and procedures in accordance with the SEC's ICI No Action Letter described above, presumably due to the burdens of the conditions outlined in the ICI letter. Consequently, the investment companies and/or their affiliated transfer agents will not accept instructions from a broker-dealer listed on the investor's account to temporarily hold transactions. Without coordinated requirements, it leaves member firms helpless to temporarily hold a transaction for a direct-at-fund account while they conduct an investigation into the suspected exploitation and thereby are rendered ineffective in protecting the investor. The SEC has expressed a common mission to protect senior investors and, given this common goal, we are requesting that FINRA advocate to harmonize the requirements for broker-dealers and investment companies and their transfer agents.

### **Endnotes**

1. **McGee, L and Urban K (2020) Adult Maltreatment Data Report 2019. Submitted to the Administration for Community Living, US Department of Health and Human Services pg. 15.**
2. **McGee, L and Urban K (2020) Adult Maltreatment Data Report 2019. Submitted to the Administration for Community Living, US Department of Health and Human Services pg 27.**
3. **Roan Gresenz, Carole, Mitchell, Jean M., Marrone, James and Federoff, Howard A. (2019) Effects of Early-stage Alzheimer's on household financial outcomes. Health Economics, Volume 29, Issue 1, January 2020 pgs. 18-29.**
4. **Stiegel, Lori A., (2012) An Overview of Elder Financial Exploitation. Generations,36 73-80.**
5. **Woods, S., Lichtenberg, P.A. (2017) Financial Capacity and Financial Exploitation of Older Adults: Research Findings, Policy Recommendations and Clinical Implications. Clinical Gerontologist, 40 (1), 3-13.**
6. **<https://www.sec.gov/divisions/investment/noaction/2018/investment-company-institute-060118-22e.htm>**
7. **Section 22(e) of the Investment Company Act of 1940 prohibits a registered investment company from suspending the right of redemption or postponing the date of payment or satisfaction upon redemption of any redeemable security in accordance with its terms for more than seven days after the tender of such security to the company or its agent designated for the purposes for redemption.**

Thank you for the opportunity to comment and we look forward to working with you in the future.

Joe Snyder, Chair

Philadelphia Financial Exploitation Prevention Task Force



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November 25, 2020

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Via email to [pubcom@finra.org](mailto:pubcom@finra.org)

Jennifer Piorko Mitchell  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

**RE: Proposed Amendments to FINRA Rule 2165  
and Retrospective Rule Review Report**

Dear Ms. Mitchell:

The University of Pittsburgh Securities Arbitration Clinic (the "Clinic") once again appreciates the opportunity to comment on the Financial Industry Regulatory Authority's ("FINRA") retrospective rule review on issues relating to senior investors. The Clinic, a University of Pittsburgh curricular offering, provides legal representation to investors who have limited resources, often advocating for clients whose claims represent much of their life savings. The Clinic provides the following commentary on the proposed amendments to Rule 2165, specifically the increased holding extension period and the inclusion of transactions in securities.

In a comment letter dated October 8, 2019 regarding FINRA's request for retrospective review on Rule 2165, the Clinic expressed concern about protections for senior and vulnerable investors from their own broker-dealer or member firms. In the comment letter, the Clinic highlighted significant issues regarding the subjective control a firm has when determining

whether a customer has a valid impairment, and the increase in potential abuse by brokers towards senior investors. For similar reasons and for further reasons established in this comment letter, the Clinic opposes extending Rule 2165 to transactions in securities for customers with the aforementioned impairments. Similarly, the Clinic also opposes the proposed increase in the safe harbor period. While we acknowledge that an adequate period for review of the facts and circumstances must be allowed, the increase to fifty-five (55) business days is excessive.

### **Opposition to the Assessment Phase Survey**

In order to assess the effectiveness of a particular rule, FINRA will often seek commentary on their notices, obtain input from advisory committees, as well as distribute anonymous surveys to member firms. The purpose of these anonymous surveys is to validate the feedback FINRA has already received, as well as to create an opportunity for member firms to provide their views. During the first quarter of 2020, FINRA developed and circulated an anonymous survey to its member firms to receive input on the effectiveness of Rule 2165. In total, two hundred thirty-eight (238) firms responded out of the three thousand five-hundred and sixteen (3,516) firms that fall under FINRA.

The Clinic has a number of issues with relying on the responses to this survey to rule on the effectiveness of Rule 2165 and whether or not the proposed amendments should be implemented. First, the population pool of the survey is biased. The respondents to the survey are all member firms that stand to benefit from an increase to the extension of the holding period of a customer's account as well as the rule's safe harbor provisions. Second, the questions are highly conclusory—member firms provided responses to the questions asked without being required to provide any information to support their claims. Third, the survey was provided to 3,516 member firms, of which only 238 member firms responded—only 6.769% of all member firms. This is an

inadequate and unrepresentative sample size of member firms to evaluate industry standards and gauge the impact of Rule 2165. There has been no attempt to investigate the economic harms caused by holds on disbursements or transactions to clients, the ratio of legitimate to illegitimate holds, average length of time to resolve a hold, or the overall amount in dispute. Without such data, and with such a small and biased sample size of member firm survey respondents, this survey should not be relied upon to draw any legitimate conclusions about the effectiveness of Rule 2165 and its proposed amendments.

#### **Safe Harbor Provision & Potential Harms by Member Firms**

Rule 2165 provides member firms with a safe harbor from FINRA Rules 2010, 2150, and 11870 when member firms exercise discretion in placing temporary holds on disbursements of funds or securities from the accounts of specified adults consistent with the requirements of Rule 2165. Under Rule 2165's safe harbor approach, a firm would be permitted, but not required, to place a temporary hold on a client's account when there is a reasonable belief that the customer is being financially exploited. Neither the current Rule 2165—nor the proposed amendments to the rule—provides a safeguard that would prohibit member firms from taking advantage of a client by placing a hold on an account to financially benefit themselves.

First, there is no built-in mechanism to enable clients a means for recovery if a hold is placed on their account and they suffer harm as a result of this hold. Customers may incur costs from the extended delay, the value of their account could decrease over time, and they would lose access to their freedom of financial disposition by not being able to withdraw the balance of their account when they so desire. There are also a number of situations where a customer's account could be placed on a hold due to a member firm misidentifying financial exploitation, negligence

on the behalf of a member firm, or there could be an unreasonable extension of the hold due to substandard internal compliance procedures.

Additionally, elderly Americans face an almost equal amount of risk of being financially exploited by strangers—such as member firms—than as by their friends or family.<sup>1</sup> Member firms are in a unique position to perpetrate financial exploitation of elderly and vulnerable individuals. There is the potential for an illegitimate hold to be placed on an elderly or vulnerable customer's account in order for the member firm to financially benefit themselves. A member firm could place a hold in order to report higher quarterly earnings, to prevent a vulnerable or elderly customer from leaving their firm and taking their money elsewhere, or to simply continue to earn maintenance fees when a customer is considering leaving. This is a non-exhaustive list of possibilities. There are many other unfortunate reasons why a member firm could potentially undertake such illegitimate holds in order to financially benefit themselves.

In Rule 2165's current form, in order for a member firm to place a temporary hold on an elderly or vulnerable customer's account there must be an internal review mechanism in place. The member firm placing the hold on the account is required to conduct an internal review of the facts and circumstances that led to the hold being placed on the account in the first place. There is no external reporting requirement, such as to an outside state agency or a court of competency, for either the initial holding period or for an extension of this holding period. The proposed amendments to Rule 2165 contemplate the addition of another potential thirty (30) day holding period. This would add a requirement for a member firm to notify an outside state agency or a court of competency of their hold on the customer's account, but at this point up to twenty-five (25) business days could have passed with no external reporting requirement. This is an incredibly

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<sup>1</sup> MetLife, The MetLife Study of Elder Financial Abuse 3, 7 (2011) ("Cases involving strangers as the perpetrators comprised 51% of the articles.").

long period of time, and one in which financial exploitation of the vulnerable customer by the member firm could have already taken place. It is also in contrast to parallel state regulations that have been passed to prevent the financial exploitation of these vulnerable individuals. The majority of these state regulations require member firms to report a hold—and their internal review of the facts and circumstances leading to it—to an outside state regulatory agency or a court of competency prior to receiving any extension of this initial holding period.<sup>2</sup> The proposed amendments to Rule 2165 far exceed any current state regulation that has been enacted, and they do nothing to further protect vulnerable and elderly investors from financial exploitation by member firms.

Without an external reporting requirement until twenty-five (25) business days have already passed, there is no failsafe if an illegitimate hold is placed on an account by a member firm. This means that if an elderly or vulnerable customer is being financially exploited by a member firm, it would be the member firm itself that would be responsible for reviewing the facts and circumstances of the financial exploitation—this is an incredibly problematic standard that does not account for such exploitation of customers by member firms themselves. Even if a hold is legitimate and there are facts and circumstances that support this hold, there is still no outside organization that is being notified of this process and which can monitor the speed, thoroughness, and overall effectiveness of the review process.

#### **Increased Holding Extension Period**

FINRA Rule 2165(b) currently allows a member to place a temporary hold on the disbursement of funds and securities from the account of a specified adult if certain conditions are

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<sup>2</sup> See generally states that have enacted such protections, a list of which is available at <https://www.nasaa.org/industry-resources/senior-issues/model-act-to-protect-vulnerable-adults-from-financial-exploitation/>.

met. First, the member firm must reasonably believe that financial exploitation has occurred, is occurring, has been attempted, or will be attempted. Secondly, they must inform all parties authorized to transact on the account/the trusted contact person within two (2) business days. Finally, they must initiate an internal review of the facts and circumstances leading to the hold on the disbursement of funds and securities. This initial holding period may last for up to fifteen (15) business days so that the member may conduct the internal review of the facts and circumstances that led them to believe financial exploitation of the individual was taking place. Unlike many of the similar protective statutes enacted by state legislatures, this initial hold does not need to be confirmed by an outside organization or reported to an outside agency.<sup>3</sup>

This rule also allows the initial holding period of fifteen (15) business days to be extended for ten (10) additional business days for further internal review—with no outside approval necessary—if the member firm determines that their belief is reasonably supported. This is a very low bar for a member to meet, especially due to the fact that this review of the facts and circumstances is conducted internally within the member firm rather than by an outside regulatory agency or watchdog organization. This proposed amendment to Rule 2165, in addition to the proposed changes outlined elsewhere in this Comment, purports to increase the extension on the holding period even further. The proposed changes would maintain the initial ten (10) business day extension, but it would also allow another thirty (30) business day extension under the newly proposed Rule 2165(b)(4). This change is unwarranted, excessive, and could lead to financial harm for vulnerable investors who may be financially taken advantage of or exploited by members.

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<sup>3</sup> See generally states that have enacted such protections, a list of which is available at <https://www.nasaa.org/industry-resources/senior-issues/model-act-to-protect-vulnerable-adults-from-financial-exploitation/>.

The proposed addition to Rule 2165(b) would allow members to have up to fifty-five (55) business days to hold the disbursement of funds and securities from the account of a specified adult if they have a reasonable belief that financial exploitation has occurred and they report it to a state agency or a court of competency. Fifty-five (55) business days is at least eleven (11) weeks that a member could hold the disbursement of funds for these individuals. This means that for up to eleven (11) weeks, a member would be unable to access the money that is rightfully theirs, and upon which they may depend. Many senior and vulnerable investors place their money into relatively safe and stable investments because they rely upon the consistent and steady disbursement of funds. However, in addition to using these disbursements for daily living costs, many of these vulnerable individuals count on the ability to have a sum of money that they are able to withdraw and have disbursed to them in the case of an emergency, unexpected health scares, or unanticipated and large costs. For many individuals, not having the ability to access these funds being held for them by a member for up to eleven (11) weeks could have a potentially life-changing negative impact.

Pursuant to FINRA Rule 2090 members have a duty to know—and retain—the essential facts about every one of their clients so that they can effectively service the customer's account. Members should have a general awareness about what is occurring in their customers' lives, as well as how their customers normally behave, what their risk tolerance is, whether they would be at risk for unexpected medical/other expenses, etc. If they are following the mandates of Rule 2090 to know their customers, members should not need fifty-five (55) business days to determine whether or not there is financial exploitation taking place. If financial exploitation of these customers—who are traditionally at higher risk of such exploitation—is taking place, a member should be able to identify it, and take steps to prevent or rectify it much sooner than fifty-five (55)

business days. Additionally, elderly Americans in particular face an almost equal amount of risk of being financially exploited by strangers—such as stock brokers, dealers, or investment advisors—than as by their friends/family.<sup>4</sup> Thus, by allowing members to have up to fifty-five (55) business days to conduct this internal review—which does not have an outside reporting requirement or oversight by an agency—if financial exploitation is being done by the member it will be even harder to detect or prevent.

Finally, this proposed amendment to Rule 2165 is far in excess of any state statutes that have been enacted to protect vulnerable adults from financial exploitation. We conducted a survey of 28 states where the legislatures have promulgated such protections, based largely on the North American Securities Administrators Association (NASAA)'s Model Act.<sup>5</sup> When the average total holding period of the disbursement of funds was taken, including the original hold and any potential extension, it came out to 24.82 business days. Currently, Rule 2165 allows for a potential total of twenty-five (25) business days with the original hold and the extension. This proposed change would more than double the current FINRA-allowed hold on disbursement of funds or securities, and it would also more than double the average total holding period of all states that have statutorily enacted such financial exploitation protections. While we acknowledge that an adequate period for review of the facts and circumstances must be allowed, fifty-five (55) business days is simply excessive and increases the chances that a vulnerable individual could be financially exploited by a member.

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<sup>4</sup> MetLife, *The MetLife Study of Elder Financial Abuse* 3, 7 (2011) (“Cases involving strangers as the perpetrators comprised 51% of the articles.”).

<sup>5</sup> NASAA, *NASAA Model Legislation or Regulation to Protect Vulnerable Adults from Financial Exploitation* (2016). *See generally* states that have enacted such protections, a list of which is available at <https://www.nasaa.org/industry-resources/senior-issues/model-act-to-protect-vulnerable-adults-from-financial-exploitation/>.

### **Transactions in Securities**

The proposed amendments to Rule 2165 permit a member firm to place a temporary hold on a transaction in securities when the firm has a reasonable belief that a client is being financially exploited. The expansion of Rule 2165 drastically increases the control a member firm can exercise over a client's account, with relatively little oversight. As previously noted, the reasonable belief standard for implementing a hold is a very low bar for a member to meet, especially because this review of the facts and circumstances is conducted internally within the member firm rather than by an outside regulatory agency or watchdog organization.

Next, the proposed changes allow a cumulative amount of fifty-five (55) business days to hold the client's transactions. This is an excessive amount of time to resolve the issue. As previously noted, the average length of holds for states that adopted the NASAA Model Act was 24.82 business days.<sup>6</sup> Furthermore, most states required an outside court or agency to initiate the extension. While the proposed changes to FINRA Rule 2165 would allow the thirty (30) day extension "if the member firm had reported the matter to a state agency or a court of competent jurisdiction," this is still a major deviation from states' requirements of agency or court involvement before extending the hold past the initial fifteen (15) business days.

FINRA Rule 2090 provides that members have a duty to know—and retain—the essential facts about every one of their clients so that they can effectively service the customer's account. If members are adhering to Rule 2090's mandates, then twenty-five (25) business days is enough to determine on the facts whether financial exploitation is taking place. Markets can be extremely volatile—a client may suffer severe impact to their account(s) during the eleven (11) week hold. This severe impact on the value of an account could be completely unanticipated, such as what

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<sup>6</sup> *Id.*

happened to the financial market when the Covid-19 pandemic first struck the world and the market drastically changed. In such a situation, if a hold were placed on an account—whether legitimate or not—a customer would suffer severe financial loss if they were unable to withdraw their funds immediately or a hold was placed on any transactions.

While the member firms and associated persons are provided safe harbor for the hold, the client would be left without recourse for any losses. If a hold was placed on a lucrative transaction, the window of time to “buy low” will have already passed. Ultimately, the rule provides too much deference to members without adequate protections to clients and erodes the client’s freedom of financial disposition.

Finally, the proposed rule amendments fail to provide any real protections to elderly and vulnerable investors. The safe harbor approach does not require members to place a hold on an account, nor does it have any meaningful reporting requirements. The client is left with neither true protection from exploitation nor recourse for losses suffered. As previously noted, the majority of states mandate reporting to an outside state regulatory agency or a court of competency prior to an extension being granted on the hold of a customer’s account. In addition, only sixteen (16) states permit member firms to place temporary holds on transactions in securities. The proposed amendments to Rule 2165 go far beyond what any state has currently enacted. These proposed amendments displace the risk onto the customer while the member firm retains no risk; rather, the member firms should be required to report legitimate instances of financial exploitation within the initial holding period or be held accountable for failure to know the client. By placing the responsibility onto the firm, it would incentivize more timely compliance and remove the risk of economic harm from the client. Because of these reasons, Rule 2165 should not be amended to include transactions.

**Conclusion**

The Clinic opposes the proposed amendments to Rule 2165. The goal of FINRA in creating the amendments was to combat the serious problems of financial exploitation of seniors and other vulnerable adults. The Clinic shares such concerns. However, a longer holding period provides too much discretion to member firms who are motivated by pecuniary gain and does not provide any greater protections to—or a cause of action for—investors whose funds are held in error. For similar reasons as the above, Rule 2165 should not be extended to encompass transactions in securities due to the potential negative economic impact it could have on vulnerable investors.

Respectfully Submitted,

*Alice L. Stewart / as*

Alice L. Stewart, Esquire  
Director, Securities Arbitration Clinic and  
Professor of Law

*Rachael T. Shaw / as*

Rachael T. Shaw, Esquire  
Adjunct Professor of Law

ALS/RTS/cmw



**VIA ELECTRONIC MAIL**

December 4, 2020

Jennifer Piorko Mitchell  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

Re: Regulatory Notice 20-34, Proposed Amendments to FINRA Rule 2165

Dear Ms. Mitchell:

On October 5, 2020, the Financial Industry Regulatory Authority, Inc. (FINRA) published its request for public comment on proposed amendments to FINRA Rule 2165, Financial Exploitation of Specified Adults (Proposed Amendment).<sup>1</sup> The Proposed Amendment seeks to provide additional protections to senior investors from financial exploitation through extending the hold period firms can place on disbursing funds and allowing temporary holds on securities transactions.

The Financial Services Institute<sup>2</sup> (FSI) appreciates the opportunity to comment on this important proposal. FSI supports FINRA's efforts to protect senior investors from financial exploitation and supports FINRA's Proposed Amendment. While the Proposed Amendment provides useful additional tools for firms to employ to protect senior investors from potential instances of financial exploitation, we provide comments below geared toward ensuring that registered representatives and advisors can confidently initiate these measures when they have a reasonable basis to believe there may be potential exploitation without fear that they may subsequently have customer complaints that mar their Form U4. If advisors, and firms, are concerned about adverse consequences from initiating a hold on fund disbursement or a securities transaction, this could have a negative "chilling effect" on the additional safeguards this Proposed Amendment seeks to provide to senior investors. The importance of FINRA's - and the industries' - efforts to safeguard senior and vulnerable investors is only heightened with the isolation many feel as a result of Covid-19 coupled with the increase in bad actors seeking to exploit vulnerable individuals.

In addition, the Proposed Amendment offers an opportunity for FINRA to provide guidance on expectations related to the "internal review" firms should undertake, given that

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<sup>1</sup> FINRA Regulatory Notice 20-34 (Oct. 5, 2020), <https://www.finra.org/sites/default/files/2020-09/Regulatory-Notice-20-34.pdf> (Reg. Notice 20-34).

<sup>2</sup> The Financial Services Institute (FSI) is an advocacy association comprised of members from the independent financial services industry, and is the only organization advocating solely on behalf of independent financial advisors and independent financial services firms. Since 2004, through advocacy, education and public awareness, FSI has been working to create a healthier regulatory environment for these members so they can provide affordable, objective financial advice to hard-working Main Street Americans.

firms routinely report the situation to the appropriate state agency, who initiate their own investigation. FSI also recommends the expansion of the Rule's safe harbor provision.

### **Discussion**

FSI supports the extension of the hold time period for the distribution of funds and the expansion of Rule 2165 to allow holds on securities transactions. While we support the Proposed Amendment, we believe FINRA should better safeguard advisors, and firms, from ill-founded complaints of wrongdoing that could undermine this Rule's full potential to protect senior investors. As FINRA noted, some member firms have declined to use the safe harbor because of "litigation risks associated with placing temporary holds or in evaluating whether a customer is being financially exploited."<sup>3</sup> While the expansion of this Rule to securities transactions is positive, it also heightens potential risk for those who choose to place a hold – a decision no advisor or firm takes lightly. FINRA should also provide additional guidance concerning its expectations relating to a firm's internal review of the facts and circumstances surrounding the potential financial exploitation. Generally, firms promptly report the financial exploitation to the appropriate state agency and that agency, who has specialized knowledge, initiates its own investigation. Firms cooperate with state agencies, but do not want to interfere with their investigation, especially in instances where a criminal investigation is initiated. These concerns are discussed below.

#### **I. FINRA's Proposed Expansion of the Hold Time and Extension of Holds to Securities Transactions Promotes Investor Protection and FINRA should take Additional Steps to Ensure Advisors Feel Secure Using Rule 2165 to Maximize the Proposed Amendment's Effectiveness**

##### **A. Introduction**

The Proposed Amendment includes two main changes: 1) it expands the coverage of Rule 2165 to allow a temporary hold on securities transactions; and 2) it extends the time period for temporary holds for up to 30 additional business days, provided that the member's internal review of the facts and circumstances supports the member's reasonable belief that the financial exploitation has occurred, is occurring, has been attempted, or will be attempted and the member has reported their reasonable belief to a state regulator or agency of competent jurisdiction or a court of competent jurisdiction. Rule 2165 would maintain its record retention requirements and "safe harbor" provision, with modification to cover securities transactions.<sup>4</sup>

FSI believes that both changes will enhance investor protection for the reasons outlined by FINRA in Reg. Notice 20-34. FSI applauds FINRA for its ongoing focus on protection of senior investors and vulnerable adults. Recently, the importance of this focus has become amplified because of the increase in fraud associated with bad actors during the Covid-19 crisis.<sup>5</sup> Many of

<sup>3</sup> Reg. Notice 20-34, at n.12.

<sup>4</sup> FINRA Rule 2165.01 Applicability of Rule. This Rule provides members and their associated persons 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 the Accounts of Specified Adults or transactions in securities in the Accounts of Specified Adults consistent with the requirements of this Rule. This Rule does not require members to place temporary holds on disbursements of funds or securities from the Accounts of Specified Adults or transactions in securities in the Accounts of Specified Adults.

<sup>5</sup> See e.g., Seniors face increased risk for financial exploitation associated with COVID-19, Investment News (Apr. 6, 2020), <https://www.investmentnews.com/seniors-face-increased-risk-financial-exploitation-covid-19-191081>; Sadie

the risk factors that make senior investors vulnerable, including isolation, but also fear, are much more prevalent because of the pandemic.<sup>6</sup> A longtime, trusted advisor may serve as a main point of contact for a senior investor and, given that many advisors have long-term relationships with their clients, the advisor may be well positioned to identify instances of financial exploitation.

FSI does suggest additional modifications below for FINRA's consideration, which are based on ensuring that advisors are confident that there will not be negative consequences from flagging instances of possible financial exploitation. Our comments are geared toward ensuring that FINRA Rule 2165 is best positioned to be used to the maximum extent possible.

**B. FINRA Should Develop Mechanisms to Ensure that Advisors Are Not Subject to Unfounded Customer Complaints When They Appropriately Use Rule 2165 to Safeguard Investors**

FSI is concerned that advisors, acting in good faith and out of concern for a client, could be negatively impacted should a customer (his agents or heirs) complain after-the-fact. If advisors (and firms) perceive possible negative consequences, they may be less likely to flag potential concerns. This may limit, over time, the effectiveness of this Rule and the Proposed Amendment's goal to better protect senior investors. FSI members are cognizant that the placement of a hold should not be taken lightly, but advisors and firms should not feel deterred from placing a hold when appropriate – even in instances where there is a reasonable belief of potential exploitation that later proves not to bear out.

Given the Proposed Amendment's expansion to securities transactions the possibility for after-the-fact dissatisfaction increases. For example, an advisor may identify indications of possible financial exploitation that provide a reasonable basis for the firm to place a hold on a securities transaction. Additional information later shows that the initial causes for concern, while reasonable, were not problematic and the hold on a securities transaction is released. During the hold, the market moves in a direction adverse to the client's interests – the stock price of the security the client wanted to sell declines substantially based on negative news. The client is upset by the delay and files a complaint against his advisor; it is reportable on the advisor's Form U4. Based on these types of scenarios, firms also may experience greater litigation risk.

As FINRA outlined in Reg. Notice 20-34, Form U4 and Form U5 are “public facing” and based on the allegation-based nature of the complaint process, an advisor could be subject to a complaint related to a hold even when the advisor acted in good faith and had a reasonable basis for an initial determination for a hold. FINRA summarized that firm survey results indicated certain challenges, more generally, associated with customers not believing that they were being financially exploited – detecting red flags of potential exploitation can be nuanced and most seniors do not want to believe they are victims. To make this Rule as effective as possible, FINRA should consider additional protections for advisors so they can confidently act when there is possible exploitation that could have long-term negative consequences on a client's financial future and overall well-being. Otherwise, an advisor is left to defend his or her reputation and, as FINRA knows, advisors take all disclosable events very seriously. In fact, advisors don't have unilateral authority, without their firms, to place holds on customers. Yet, customer complaints

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Gurman, Coronavirus Creates an Epidemic of Scams, WSJ (March 30, 2020), <https://www.wsj.com/articles/coronavirus-creates-an-epidemic-of-scams-11585601885>

<sup>6</sup> See e.g., Grace Smith and Ashley Hunter, Elder abuse is spiraling in age of COVID-19, Tennessean (June 14, 2020) <https://www.tennessean.com/story/opinion/2020/06/14/elder-abuse-spiraling-coronavirus-fifty-forward/3175138001/>

included on an advisor's U4 may make the advisor appear as though he or she engaged in malfeasance, misfeasance, or serious wrongdoing when, in fact, the advisor took appropriate steps to protect a long-time client – these types of unintended consequences should be avoided.

While FINRA notes “[t]o date, based on FINRA's review of reported complaints, member firms have not reported a complaint on Forms U4 or U5 or pursuant to Rule 4530 related to placing a temporary hold pursuant to Rule 2165,” the expansion to securities transactions, and extension of the hold period, under the Proposed Amendment increase the likelihood of complaints associated with holds placed in accordance with FINRA Rule 2165. Securities transaction holds introduce a new risk related to the possibility of negative market movements. The extreme market volatility of this past year evidences this risk and economic downturns are often associated with an increase in financial fraud and exploitation. In addition, without a clear problem-code or tracking mechanism tied to Rule 2165 it may be difficult to easily identify complaints that stem from a hold, but are submitted based on claims of conversion, unauthorized trading, failure to follow a customer's instructions or best-execution-like concerns.

### C. Suggested Changes

As discussed above, a hold could make an investor believe that his advisor (or firm) failed to meet certain obligations especially if there is an adverse stock price movement during a hold. Resulting complaints or litigation may result in a “chilling effect” on initiating holds. FINRA could consider a variety of mechanisms to try to minimize these issues and ensure that the concerns outlined above do not inadvertently undercut the intent of the Proposed Amendment – to protect senior investors. We have included a few suggestions below:

- *FINRA Review Process for Rule 2165-Related Customer Complaints:* While FINRA has indicated that it does not want to “limit a customer's right to submit a complaint,” Rule 2165's record retention requirements would make FINRA review of any related customer complaints expeditious. If the complaint is tied to a properly issued hold, FINRA could consider removing the complaint or affixing a code or link to Rule 2165 to alert the public, but also other regulators that use Forms U4 and U5, that the complaint is associated with a hold placed under FINRA Rule 2165. This process would not be overly burdensome for FINRA and it would be fair to the advisor as well as helpful to the public and other regulators who rely on Forms U4 and U5.
- *Waive Expungement Fees:* Should an advisor seek to expunge an erroneous or inaccurate customer complaint stemming from a properly placed Rule 2165 hold, the advisor is left bearing the cost of what is an increasingly expensive expungement process. FINRA could waive expungement fees associated with FINRA Rule 2165 complaints.

We appreciate FINRA's willingness to “reconsider this issue or develop a specified problem code for reporting any Rule 2165-related complaint to FINRA pursuant to FINRA Rule 4530 if complaints are reported in the future and they appear to have a detrimental impact on the protection of seniors and other vulnerable adults,” but believe steps taken now to address these identified unintended negative consequences will more promptly reduce any detrimental impact. This is of particular importance given the Proposed Amendment's expansion to holds for securities transactions. More generally, the pressing importance of protecting senior investors from financial exploitation supports taking affirmative steps now so that Rule 2165 is as effective as possible to prevent the devastating consequences that result from financial exploitation.

## **II. FINRA Should Consider Providing Additional Guidance on Firms' Internal Review Obligations and Expand Rule 2165's Safe Harbor**

### **A. Additional Guidance on FINRA's Expectations for the Rule's Internal Review Requirement Would Assist Firms Using this Rule to Protect Senior Investors**

In identified cases of potential financial exploitation, especially ones that involve possible criminal conduct, it is routine practice for firms to promptly report the situation to the appropriate agency, usually adult protective services (APS) and/or law enforcement. These agencies have the appropriate expertise to conduct these types of investigations and firms work cooperatively to provide them requested information. As outlined above, frequently, when a firm places a hold on an account, the client is upset – not wanting to believe that a new acquaintance or family member is trying to take advantage of him or her – and he or she can be uncooperative in providing additional information. Firms have access to internal records that evidence the client's regular trading and account disbursement activity, but firms do not want to, for example, front-run and jeopardize a criminal investigation by trying to contact and interview witnesses. Firms who seek to protect clients and use Rule 2165's safe harbor would benefit from additional guidance outlining FINRA's expectations as to the scope and nature of the "internal review" identified in the Rule.

### **B. FINRA Should Expand the Application of Rule 2165's Safe Harbor**

FINRA should expand the application of the safe harbor provided by FINRA Rule 2165.01 to cover both FINRA Rule 3260 (Discretionary Accounts)<sup>7</sup> and FINRA Rule 5310.01 (Execution of Marketable Customer Orders)<sup>8</sup> because of the Proposed Amendment's expansion to securities transactions. If an advisor does not have time or price discretion, and a client submits a market order to sell, for example, an advisor is obligated to follow the client's instructions and also execute (or take steps to execute) the marketable order "fully and promptly." Placing a hold on a securities transaction could implicate these two rules.

## **Conclusion**

We are committed to constructive engagement in the regulatory process and welcome the opportunity to work with FINRA on this and other important regulatory efforts.

Thank you for considering FSI's comments. Should you have any questions, please contact me at [Redacted]

Respectfully submitted,



Vice President, Regulatory Affairs & Associate General Counsel

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<sup>7</sup> FINRA Rule 3260(b) (Authorization and Acceptance of Account) states "No member or registered representative shall exercise any discretionary power in a customer's account unless such customer has given prior written authorization to a stated individual or individuals and the account has been accepted by the member, as evidenced in writing by the member or the partner, officer or manager, duly designated by the member, in accordance with Rule 3110."

<sup>8</sup> FINRA Rule 5310.01 states "[a] member must make every effort to execute a marketable customer order that it receives fully and promptly."

## EXHIBIT 5

Exhibit 5 shows the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

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### 2000. DUTIES AND CONFLICTS

\* \* \* \* \*

### 2100. TRANSACTIONS WITH CUSTOMERS

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#### 2165. Financial Exploitation of Specified Adults

(a) No Change.

#### (b) Temporary Hold on Disbursements or Transactions

(1) A member may place a temporary hold on a disbursement of funds or securities from the Account of a Specified Adult or a transaction in securities in the Account of a Specified Adult if:

(A) The member reasonably believes that financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted; and

(B) The member, not later than two business days after the date that the member first placed the temporary hold on the disbursement of funds or securities or the transaction in securities, provides notification orally or in writing, which may be electronic, of the temporary hold and the reason for the temporary hold to:

(i) all parties authorized to transact business on the Account, unless a party is unavailable or the member reasonably believes that the

party has engaged, is engaged, or will engage in the financial exploitation of the Specified Adult; and

(ii) the Trusted Contact Person(s), unless the Trusted Contact Person is unavailable or the member reasonably believes that the Trusted Contact Person(s) has engaged, is engaged, or will engage in the financial exploitation of the Specified Adult; and

(C) The member immediately initiates an internal review of the facts and circumstances that caused the member to reasonably believe that the financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted.

(2) The temporary hold authorized by this Rule will 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 or the transaction in securities, unless otherwise terminated or extended by a state regulator or agency of competent jurisdiction or a court of competent jurisdiction, or extended pursuant to paragraph (b)(3) of this Rule.

(3) Provided that the member's internal review of the facts and circumstances under paragraph (b)(1)(C) of this Rule supports the member's reasonable belief that the financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted, the temporary hold authorized by this Rule may be extended by the member for no longer than 10 business days following the date authorized by paragraph (b)(2) of this Rule, unless otherwise terminated or extended by a state regulator or agency of competent jurisdiction or a court of competent jurisdiction, or extended pursuant to paragraph (b)(4) of this Rule.

(4) Provided that the member's internal review of the facts and circumstances under paragraph (b)(1)(C) of this Rule supports the member's reasonable belief that the financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted and the member has reported or provided notification of the member's reasonable belief to a state regulator or agency of competent jurisdiction or a court of competent jurisdiction, the temporary hold authorized by this Rule may be extended by the member for no longer than 30 business days following the date authorized by paragraph (b)(3) of this Rule, unless otherwise terminated or extended by a state regulator or agency of competent jurisdiction or a court of competent jurisdiction.

**(c) No Change.**

**(d) Record Retention**

Members shall retain records related to compliance with this Rule, which shall be readily available to FINRA, upon request. The retained records shall include records of: (1) request(s) for disbursement or transaction that may constitute financial exploitation of a Specified Adult and the resulting temporary hold; (2) the finding of a 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 or transaction; (3) the name and title of the associated person that authorized the temporary hold on a disbursement or transaction; (4) notification(s) to the relevant parties pursuant to paragraph (b)(1)(B) of this Rule; [and] (5) the internal review of the facts and circumstances pursuant to paragraph (b)(1)(C) of this Rule; and (6) the reason and support for any extension of a temporary hold, including information regarding any communications with or by a state regulator or agency of competent jurisdiction or a court of competent jurisdiction.

• • • **Supplementary Material:** -----

**.01 Applicability of Rule.** This Rule provides members and their associated persons 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 the Accounts of Specified Adults or transactions in securities in the Accounts of Specified Adults consistent with the requirements of this Rule. This Rule does not require members to place temporary holds on disbursements of funds or securities from the Accounts of Specified Adults or transactions in securities in the Accounts of Specified Adults.

.02 through .03 No Change.

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