



August 23, 2021

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

**Re: File No. SR-FINRA-2021-016 (Proposed Rule Change to Amend Rule 2165
(Financial Exploitation of Specified Adults))**

Dear Ms. Countryman:

This letter responds to comments received by the Securities and Exchange Commission ("SEC" or "Commission") to the above-referenced rule filing (the "Proposal") to amend Rule 2165 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 Commission published the Proposal for public comment in the Federal Register on June 28, 2021,¹ and received five comments in response to the Proposal.² The following are FINRA's responses, by topic, to the comments.

¹ See Securities Exchange Act Release No. 92225 (June 22, 2021), 86 FR 34084 (June 28, 2021) (Notice of Filing of File No. SR-FINRA-2021-016).

² See letters from Eric Arnold and Clifford Kirsch of Eversheds Sutherland on behalf of the Committee of Annuity Insurers to Vanessa Countryman, Secretary, SEC (July 19, 2021) (CAI); William Benson, National Policy Adviser, and Kendra Kuehn, National Policy Adviser, National Adult Protective Services Association to Vanessa Countryman, Secretary, SEC (July 29, 2021) (NAPSA); Lisa Bleier and Marin Gibson, Securities Industry and Financial Markets Association, to SEC (July 28, 2021) (SIFMA); Christine Lazaro, Director of the Securities Arbitration Clinic and Professor of Clinical Legal Education, Securities Arbitration Clinic at St. John's University School of Law to Vanessa Countryman, Secretary, SEC (July 19, 2021) (St. John's); and Ron Long, Head of Aging Client Services, Wells Fargo & Co. to Vanessa Countryman, Secretary, SEC (July 15, 2021) (Wells Fargo).

General Support for Proposal

CAI, NAPSA, SIFMA, St. John's and Wells Fargo expressed support for the Proposal. St. John's stated that "[a]lthough a number of states have adopted similar rules, the FINRA Rule creates a uniform, national standard, ensuring that investors have access to the same protections regardless of where they live." Wells Fargo "strongly support[ed] the latest amendments to FINRA Rule 2165, which supply firms with greater tools to help protect their clients from financial exploitation." CAI stated that "extending FINRA Rule 2165 to cover securities transactions will provide additional tools for firms to use to combat financial exploitation."

SIFMA reiterated its "long-standing support for FINRA's proposed amendments to Rule 2165," including both extending the temporary hold to transactions and adding 30 days to the temporary hold time when a firm has reported the matter to a state regulator or agency. SIFMA expressed its view that the proposal "will further assist financial institutions in protecting senior and vulnerable clients against financial exploitation." SIFMA also noted that currently 22 states (with over half of the U.S. population) have enacted laws permitting investment advisers and broker-dealers to place temporary holds on disbursements and transactions.³

NAPSA also recommended that investment companies, such as mutual funds, be permitted to place temporary holds. The SEC has jurisdiction over investment companies and their transfer agents. As discussed in the Proposal, 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.⁴ 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.

³ As of August 2021, the following states permit holds on disbursement and transactions: Arkansas, Arizona, California, Florida, Hawaii, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah, Virginia, Washington and West Virginia. The Hawaii and Ohio legislation became law since the Proposal was filed with the SEC.

⁴ See Investment Company Institute, SEC No-Action Letter (June 1, 2018).

Hold Period

SIFMA supports extending the temporary hold time an additional 30 days when the firm has reported the matter to a state regulator or agency, though SIFMA noted that Adult Protective Services (APS), with whom firms often coordinate, may need even more time to conduct investigations. SIFMA also noted that since FINRA initially proposed permitting a firm to extend the temporary hold for an additional period if the firm had reported the matter to a state regulator or agency or a court of competent jurisdiction, the South Carolina senior financial exploitation protection law and pending Michigan legislation have incorporated this type of extension.

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 federal National Adult Maltreatment Reporting System (NAMRS) is 52.6 days also highlights the need for a longer period to conduct investigations and resolve matters.

CAI stated that even with the proposed extension of the additional 30-business days, the difficult choices faced by firms that run up to, and past, the deadlines under Rule 2165, have not been solved. CAI suggested that FINRA should plan, and must continue, to work with the applicable state agencies and courts to ensure a speedy process for resolution of the issues raised by financial exploitation and attempt to impress upon them the vital importance of aligning the interests of the different regulatory and judicial constituencies with respect to the permitted time frame to hold disbursements or transactions. CAI further encourages FINRA to review the hold period again in the future to assess its efficacy.

As stated in the Proposal, 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 permits the temporary hold to be terminated or extended by a state regulator, state agency or court of competent jurisdiction. FINRA staff has met and will continue to meet with APS staff in multiple states, in part through NAPSA, to increase coordination of senior investor protection efforts and highlight Rule 2165's provision that APS can direct a member firm to terminate or extend a temporary hold authorized by the Rule. In addition, as noted in the Proposal, 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.

Mandatory Holds or Reporting

Although the protections offered by Rule 2165 are available to all investors, St. John's commented that small and mid-sized firms are more likely to have declined to utilize the safe harbor because of concerns associated with litigation risks so their investors are not receiving the same protections. Accordingly, St. John's requested that FINRA consider making Rule 2165 proscriptive rather than permissive. St. John's also stated that investors would benefit from a uniform national standard of mandated reporting where financial exploitation is suspected, even if placing a hold is not mandated.

As stated in the Proposal, 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. As also stated in the Proposal and acknowledged by St. John's, 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. Where state reporting is not required, mandatory reporting of every temporary hold pursuant to the Rule 2165 may lead to an inefficient or ineffective use of time and resources for state regulators and agencies, particularly where firms were able to quickly resolve matters by engaging a customer's trusted contact person or using other tools.⁵

Cognitive Decline or Diminished Capacity

Wells Fargo supported extending the Rule 2165 safe harbor to apply where there is a reasonable belief that the investor has an impairment that renders the individual unable to protect his or her own interests, irrespective of whether there is evidence the customer may be the victim of financial exploitation by a third party. As stated in *Regulatory Notice* 20-34 and the Proposal, during the retrospective review, 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,

⁵ See, e.g., letter from Edward Jones in response to *Regulatory Notice* 20-34 and discussed in the Proposal (stating 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).

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, some stakeholders 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 and 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. 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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FINRA believes that the foregoing responds to the material issues raised by the commenters to the Proposal. If you have any questions, please contact me at (202) 728-8013, email: jeanette.wingler@finra.org.

Best regards,

/s/ Jeanette Wingler

Jeanette Wingler
Associate General Counsel