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8011-01
SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-79964; File No. SR-FINRA-2016-039)

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Partial Amendment No. 1 and Order Granting Accelerated Approval of the Proposed Rule Change to Amend Rule 4512 (Customer Account Information) and Adopt FINRA Rule 2165 (Financial Exploitation of Specified Adults), as Modified by Partial Amendment No. 1

February 3, 2017

I. Introduction

On October 19, 2016, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act")[1] and Rule 19b-4 thereunder,[2] a proposed rule change to amend FINRA Rule 4512 (Customer Account Information) and adopt new FINRA Rule 2165 (Financial Exploitation of Specified Adults). The proposed rule change would: (1) require members to make reasonable efforts to obtain the name of and contact information for a trusted contact person for a customer's account; and (2) permit members to place temporary holds on disbursements of funds or securities from the accounts of specified customers, where there is a reasonable belief that these customers have been, are being, or will be subject to financial exploitation).[3]

1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 See File No. SR–FINRA–2016–039.

The proposed rule change was published for comment in the Federal Register on November 7, 2016.[4] The public comment period closed on November 28, 2016. The Commission received twenty-one (21) comment letters on the Proposal.[5] On December 7, 2016, FINRA extended the time period in which the Commission must approve the Proposal,

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[4] See Notice of Filing of a Proposed Rule Change To Amend Rule 4512 (Customer Account Information) and Adopt FINRA Rule 2165 (Financial Exploitation of Specified Adults), Exchange Act Release No. 34–79215; File No. SR-FINRA-2016-039 (Nov. 1, 2016); 81 FR 78238 (Nov. 7, 2016) ("Proposal").

[5] See Tamra K. Solmon, Associate General Counsel, Investment Company Institute ("ICI") (Nov. 28, 2016); Gary Sanders, Counsel and Vice President, Government Relations, National Association of Insurance and Financial Advisors ("NAIFA") (Nov. 28, 2016); Catherine J. Weatherford, President & CEO, Insured Retirement Institute ("IRI") (Nov. 28 2016); Eric Arnold and Clifford Kirsch, Sutherland, Asbill & Brennan LLP, on behalf of the Committee of Annuity Insurers ("CAI") (Nov. 28, 2016); Robert J. McCarthy, Director of Regulatory Policy, Wells Fargo Advisors ("Wells Fargo") (Nov. 28, 2016); W. Alan Smith, Deputy General Counsel, Janney Montgomery Scott LLC, Philadelphia, PA ("Janney") (Nov. 28, 2016); William A. Jacobson, Clinical Professor of Law, Cornell Law School and Director, Cornell Securities Law Clinic, and Alexander K. Brehan, 2017 J.D. Candidate, Cornell Law School ("Cornell") (Nov. 28, 2016); Nicole G. Iannarone, Director, Investor Advocacy Clinic, Assistant Clinical Professor, and David Hsu, Student Intern, Georgia State University College of Law ("GSU") (Nov. 28, 2016); Carrie L. Chelko, Esq., Chief Counsel, Lincoln Financial Network ("Lincoln") (Nov. 28, 2016); David T. Bellaire, Esq., Executive Vice President and General Counsel, Financial Services Institute ("FSI") (Nov. 28, 2016); Marnie C. Lambert, President, Public Investors Arbitration Bar Association, Norman, OK ("PIABA") (Nov. 28, 2016); Lisa J. Bleier, Managing Director and Associate General Counsel, SIFMA, Washington, D.C. (Nov. 28, 2016); Atasia Richardson and Alyse Velger, Student Interns, and Elissa Germaine, Supervising Attorney, Pace Investor Rights Clinic, Elisabeth Haub School of Law, Pace University, White Plains, NY ("PIRC") (Nov. 28, 2016); Mike Rothman, President, NASAA, and Minnesota Commissioner of Commerce ("NASAA") (Nov. 28, 2016); Richard Foster, Financial Services Roundtable, Washington, D.C. ("FSR") (Nov. 28, 2016); David P. Bergers, General Counsel, LPL Financial LLC ("LPL") (Nov. 28, 2016); Jigar Gandhi, Counsel, American Counsel of Life Insurers ("ACLI") (Nov. 28, 2016); Michael Nicholas, Chief Executive Officer, Bond Dealers of America ("BDA") (Nov. 28, 2016); Jesse Hill, Principal, Government and Regulatory Relations, Edward Jones ("Edward Jones") (Nov. 28, 2016); Manisha Kimmel, Chief Regulatory Officer, Wealth Management, Thomson Reuters ("Thomson Reuters") (Dec. 5, 2016); and Rick Fleming, Investor Advocate, U.S. Securities and Exchange Commission, Office of the Investor Advocate ("Investor Advocate") (Dec. 28, 2016). The comment letters are available on FINRA's website at http://www.finra.org, at the principal office of FINRA, at the Commission's website at https://www.sec.gov/comments/sr-finra-2016-039/finra2016039.shtml, and at the Commission's Public Reference Room.

disapprove the Proposal, or institute proceedings to determine whether to approve or disapprove the Proposal to February 3, 2017.[6] On January 19, 2017, FINRA filed a response to the comment letters,[7] along with Partial Amendment No. 1 to the Proposal.

This order provides notice of the filing of Partial Amendment No. 1 and approves the Proposal, as modified by Partial Amendment No. 1, on an accelerated basis.

II. Description of the Proposal[8]

A. Background

With the aging of the U.S. population, financial exploitation of seniors and other vulnerable adults is a serious and growing problem.[9] FINRA's experience with the FINRA Securities Helpline for Seniors® ("Seniors Helpline") has highlighted issues relating to financial exploitation of seniors and other vulnerable adults.[10] A number of reports and studies also have

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6 See Letter from Jeanette Wingler, Associate General Counsel, FINRA, to Katherine England, Assistant Director, Division of Trading and Markets, Securities and Exchange Commission, dated December 7, 2016.

7 See Letter from Jeanette Wingler, Associate General Counsel, FINRA, to Brent J. Fields, Secretary, Securities and Exchange the Commission, dated January 19, 2017 ("FINRA Response Letter"). The FINRA Response Letter and the text of Partial Amendment No. 1 are available on FINRA's website at http://www.finra.org, at the principal office of FINRA, at the Commission's website at https://www.sec.gov/comments/sr-finra-2016-039/finra2016039.shtml, and at the Commission's Public Reference Room.

8 The subsequent description of the Proposal is substantially excerpted from FINRA's description in the Proposal. See Proposal, 81 FR at 78238 - 78257.

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

10 See FINRA Launches Toll-Free FINRA Securities Helpline for Seniors (April 20, 2015). See also Report on the FINRA Securities Helpline for Seniors (December 2015) (stating that from its launch on April 20, 2015 until December 2015, the Seniors Helpline received more than

explored various aspects of this important topic.[11] Moreover, studies indicate that financial exploitation is the most common form of elder abuse.[12] Financial exploitation can be difficult for any investor, but it can be particularly devastating for seniors and other vulnerable adults, many of whom are living on fixed incomes without the ability to offset significant losses over time or through other means.[13] Financial exploitation can occur suddenly, and once funds leave an account they can be difficult, if not impossible, to recover, especially when they ultimately are transferred outside of the U.S.[14] Members need more effective tools that will allow them to quickly and effectively address suspected financial exploitation of seniors and other vulnerable adults. Currently, however, FINRA rules do not explicitly permit members to contact a non-account holder or to place a temporary hold on disbursements of funds or securities where there is a reasonable belief of financial exploitation of a senior or other vulnerable adult.

2,500 calls with an average call duration of nearly 25 minutes) (hereinafter "Seniors Helpline Report"); FINRA Securities Helpline for Seniors Marks First Year, with $1.3 Million Returned to Investors (April 20, 2016) (stating that, "To date, the helpline has fielded more than 4,200 calls, recovering over $1.3 million in voluntary reimbursements from firms since its launch in April 2015").

11 See, e.g., National Senior Investor Initiative: A Coordinated Series of Examinations, SEC's Office of Compliance Inspections and Examinations and FINRA (April 15, 2015) (hereinafter "Senior Investor Initiative"); MetLife Study; and Seniors Helpline Report.

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

13 See Seniors Helpline Report.

14 See Seniors Helpline Report.

To address these issues, the Proposal would provide members with a way to quickly respond to situations in which they have a reasonable basis to believe that financial exploitation of vulnerable adults has occurred or will be attempted. FINRA believes that a member can better protect its customers from financial exploitation if the member can: (1) place a temporary hold on a disbursement of funds or securities from a customer's account; and (2) notify a customer's trusted contact person when there is concern that, among other things, the customer may be the victim of financial exploitation. These measures will assist members in thwarting financial exploitation of seniors and other vulnerable adults before potentially ruinous losses occur. As discussed below, FINRA is proposing a number of safeguards to help ensure that there is not a misapplication of the Proposal and that customers' ordinary disbursements are not disrupted.

According to FINRA, a small number of states have enacted statutes that permit financial institutions, including broker-dealers, to place temporary holds on "disbursements" or "transactions" if financial exploitation of covered persons is suspected.[15] In addition, the North American Securities Administrators Association ("NASAA") created a model state act to protect vulnerable adults from financial exploitation ("NASAA model"). Due to the small number of state statutes currently in effect and the lack of a federal standard in this area, FINRA believes that the Proposal would aid in the creation of a uniform national standard for the benefit of members and their customers.

B. Terms of the Proposal

1. Trusted Contact Person

The Proposal would amend Rule 4512 to require members to make reasonable efforts to

[15] See, e.g., DEL. CODE ANN. tit. 31, § 3910 (2015); MO. REV. STAT. §§ 409.600-.630 (2015); WASH. REV. CODE §§ 74.34.215, 220 (2015); and IND. CODE ANN. § 23-19-4.1 (2016).

obtain the name of and contact information for a trusted contact person upon the opening of a non-institutional customer's account.[16] It would also require that the trusted contact person be age 18 or older.[17] While the Proposal did not specify what contact information should be obtained for a trusted contact person, FINRA noted that a mailing address, telephone number and email address for the trusted contact person may be the most useful information for members.

The Proposal would not prohibit members from opening and maintaining an account if a customer fails to identify a trusted contact person as long as the member made reasonable efforts to obtain a name and contact information.[18] FINRA stated that asking a customer to provide the name and contact information for a trusted contact person ordinarily would constitute reasonable efforts to obtain the information and would satisfy the Proposal's requirements.

The Proposal would not require a member to attempt to obtain the name of and contact information for a trusted contact person for accounts in existence prior to the effective date of the Proposal ("existing accounts") until such time as the member updates the information for the account either in the course of the member's routine and customary business or as otherwise required by applicable laws or rules.[19] With respect to any account subject to the requirements of Exchange Act Rule 17a-3(a)(17) to periodically update customer records, the Proposal would require a member to make reasonable efforts to obtain or, if previously obtained, to update where appropriate, the name and contact information for a trusted contact person in the manner and

16 See proposed Rule 4512(a)(1)(F).

17 See proposed Rule 4512(a)(1)(F).

18 See proposed Supplementary Material .06(b) to Rule 4512.

19 See Rule 4512(b).

timeframes required under Exchange Act Rule 17a-3(a)(17).[20] With regard to updating the contact information once provided for other accounts that are not subject to the requirements in Exchange Act Rule 17a-3, FINRA stated that a member should consider asking the customer to review and update the name of and contact information for a trusted contact person on a periodic basis or when there is a reason to believe that there has been a change in the customer's situation.[21]

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

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[20] See proposed Supplementary Material .06(c) to Rule 4512. The reference to the requirements of Rule 17a-3(a)(17) includes the requirements of Rule 17a-3(a)(17)(i)(A) in conjunction with Rule 17a-3(a)(17)(i)(D). In this regard, Rule 17a-3(a)(17)(i)(D) provides that the account record requirements in Rule 17a-3(a)(17)(i)(A) only apply to accounts for which the member, broker or dealer is, or has within the past 36 months been, required to make a suitability determination under the federal securities laws or under the requirements of a self-regulatory organization of which it is a member.

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

business or as otherwise required by applicable laws or rules.[22]

FINRA believes that members and customers will benefit from the trusted contact information in many different settings. For example, consistent with the disclosure, if a member has been unable to contact a customer after multiple attempts, a member could contact a trusted contact person to inquire about the customer's current contact information. Or if a customer is known to be ill or infirm and the member has been unable to contact the customer after multiple attempts, the member could contact a trusted contact person to inquire about the customer's health status. A member also could reach out to a trusted contact person if it suspects that the customer may be suffering from Alzheimer's disease, dementia or other forms of diminished capacity. A member could contact a trusted contact person to address possible financial exploitation of the customer before placing a temporary hold on a disbursement. In addition, as discussed below, pursuant to proposed Rule 2165, when information about a trusted contact person is available, a member must notify the trusted contact person orally or in writing, which may be electronic, if the member has placed a temporary hold on a disbursement of funds or securities from a customer's account, unless the member reasonably believes that the trusted contact person is engaged in the financial exploitation.[23]

The trusted contact person is intended to be a resource for the member in administering the customer's account, protecting assets and responding to possible financial exploitation. A member may use its discretion in relying on any information provided by the trusted contact

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

23 See proposed Rule 2165(b)(1)(B)(ii).

person. A member may elect to notify an individual that he or she was named as a trusted contact person; however, the Proposal would not require such notification.

2. Temporary Hold on Disbursement of Funds or Securities

The Proposal would permit a member that reasonably believes that financial exploitation may be occurring to place a temporary hold on the disbursement of funds or securities from the account of a "specified adult" customer.[24] The Proposal would create no obligation to withhold a disbursement of funds or securities where financial exploitation may be occurring. In this regard, Supplementary Material to proposed Rule 2165 would explicitly state that the Rule provides members with a safe harbor from FINRA Rules 2010 (Standards of Commercial Honor and Principles of Trade), 2150 (Improper Use of Customers' Securities or Funds; Prohibition Against Guarantees and Sharing in Accounts) and 11870 (Customer Account Transfer Contracts) "when members exercise discretion in placing temporary holds on disbursements of funds or securities from the accounts of specified adults under the circumstances denoted in the Rule."[25] The proposed safe harbor would not apply to a decision not to place a hold; rather, as stated in the proposed rule, members would be provided with a safe harbor from certain FINRA rules when exercising their discretion to place a temporary hold. The proposed Supplementary

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

[25] See proposed Supplementary Material .01 to Rule 2165. As discussed further below, Partial Amendment No. 1 clarifies the scope of Supplementary Material .01 to Rule 2165 by adding the words "associated persons" to the Proposal's safe harbor, and by providing that the safe harbor is available when members exercise discretion in placing a temporary hold "consistent with the requirements of this Rule.

Material would further state that the Rule does not require members to place temporary holds on disbursements of funds or securities from the account of a specified adult.[26]

FINRA believes that "specified adults" may be particularly susceptible to financial exploitation.[27] Proposed Rule 2165 would define "specified adult" as: (A) a natural person age 65 and older;[28] 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.[29] Supplementary Material to proposed Rule 2165 would provide that a member's reasonable belief that a natural person age 18 and older has a mental or physical impairment that renders the individual unable to protect his or her own interests may be based on the facts and circumstances observed in the member's business relationship with the person.[30] The Proposal would define the term "account" to mean any account of a member for which a specified adult

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[26] See proposed Supplementary Material .01 to Rule 2165. FINRA understands that some members, pursuant to state law or their own policies, may already place temporary holds on disbursements from customers' accounts where financial exploitation is suspected.

[27] See Senior Investor Initiative (noting the increase in persons aged 65 and older living in the United States and the concentration of wealth in those persons during a time of downward yield pressure on conservative income-producing investments). See also FINRA Foundation Study (noting that respondents age 65 and over were more likely to be solicited to invest in a potentially fraudulent opportunity (93%), more likely to engage with the offer (49%) and more likely to have lost money (16%) than younger respondents); MetLife Study (noting the many forms of vulnerability that "make elders more susceptible to [financial] abuse," including, among others, poor physical or mental health, lack of mobility, and isolation); Protecting Elderly Investors from Financial Exploitation: Questions to Consider (February 5, 2015) (noting that one of the greatest risk factors for diminished capacity is age).

[28] See, e.g., Aging Statistics, U.S. Department of Health and Human Services Administration on Aging (referring to the "older population" as persons "65 years or older"); Senior Investor Initiative (noting the examinations underlying the report "focused on investors aged 65 years old or older").

[29] See proposed Rule 2165(a)(1).

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

has the authority to transact business.[31]

Because financial abuse may take many forms, FINRA has proposed a broad definition of "financial exploitation." Specifically, financial exploitation would mean: (A) the wrongful or unauthorized taking, withholding, appropriation, or use of a specified adult's funds or securities; or (B) any act or omission by a person, including through the use of a power of attorney, guardianship, or any other authority, regarding a specified adult, to: (i) obtain control, through deception, intimidation or undue influence, over the specified adult's money, assets or property; or (ii) convert the specified adult's money, assets or property.[32]

The Proposal would permit a member to place a temporary hold on a disbursement of funds or securities from the account of a specified adult if the member reasonably believes that financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted.[33] A temporary hold pursuant to proposed Rule 2165 may be placed on a particular suspicious disbursement(s) but not on other, non-suspicious disbursements.[34] The Proposal would not apply to transactions in securities.[35]

The Proposal would require that a member's written supervisory procedures identify the title of each person authorized to place, terminate or extend a temporary hold on behalf of the

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31 See proposed Rule 2165(a)(2).

32 See proposed Rule 2165(a)(4).

33 See proposed Rule 2165(b)(1)(A).

34 FINRA recognizes that a single disbursement could involve all of the assets in an account.

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

member pursuant to Rule 2165. The Proposal would require that any such person be an associated person of the member who serves in a supervisory, compliance or legal capacity for the member.[36]

If a member places a temporary hold, the Proposal would require 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.[37] In addition, the Proposal would require the member to provide notification of the hold and the reason for the hold to all parties authorized to transact business on the account, including, but not limited to, the customer, and, if available, the trusted contact person, no later than two business days after the date that the member first placed the hold.[38] While oral or written (including electronic) notification would be permitted under the Proposal, a member would be required to retain records evidencing the notification.[39]

The Proposal would not preclude a member from terminating a temporary hold after communicating with either the customer or trusted contact person. FINRA believes that a customer's objection to a temporary hold or information obtained during an exchange with the customer or trusted contact person may be used in determining whether a hold should be placed

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[36] See proposed Rule 2165(c)(2). This provision is intended to ensure that a member's decision to place a temporary hold is elevated to an associated person with appropriate authority.

[37] See proposed Rule 2165(b)(1)(C).

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

[39] See proposed Rule 2165(d).

or lifted. FINRA believes that, while not dispositive, members should weigh a customer's objection against other information in determining whether a hold should be placed or lifted.

While the Proposal would not require notifying the customer's registered representative of suspected financial exploitation, a customer's registered representative may be the first person to detect potential financial exploitation. If the detection occurs in another way, a member may choose to notify and discuss the suspected financial exploitation with the customer's registered representative.

For purposes of proposed Rule 2165, FINRA would consider the lack of an identified trusted contact person, the inability to contact the trusted contact person or a person's refusal to act as a trusted contact person to mean that the trusted contact person was not available.[40] A member may use the temporary hold provision under proposed Rule 2165 when a trusted contact person is not available.

The temporary hold authorized by proposed Rule 2165 would expire not later than 15 business days after the date that the member first placed the temporary hold on the disbursement of funds or securities, unless sooner terminated or extended by an order of a state regulator or agency or court of competent jurisdiction.[41] In addition, provided that the member's internal review of the facts and circumstances supports its reasonable belief that the financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted, the Proposal would permit the member to extend the temporary hold for an additional 10 business

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[40] Moreover, as discussed below, Partial Amendment No. 1 provides an exception from the proposed requirement in Rule 2165 to notify not later than two business days after placing a temporary hold all parties authorized to transact business on an account if a party is unavailable or if the member reasonably believes that the party has engaged, is engaged, or will engage in the financial exploitation of a Specified Adult.

[41] See proposed Rule 2165(b)(2).

days, unless sooner terminated or extended by an order of a state regulator or agency or court of competent jurisdiction.[42]

Proposed Rule 2165 would require members to retain records related to compliance with the Rule, which shall be readily available to FINRA, upon request. Retained records required by the Proposal are records of: (1) requests for disbursement that may constitute financial exploitation of a specified adult and the resulting temporary hold; (2) the finding of a reasonable belief that financial exploitation has occurred, is occurring, has been attempted or will be attempted underlying the decision to place a temporary hold on a disbursement; (3) the name and title of the associated person that authorized the temporary hold on a disbursement; (4) notification(s) to the relevant parties pursuant to the Rule; and (5) the internal review of the facts and circumstances supporting the member's reasonable belief that the financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted.[43]

The Proposal would require a member that anticipates using a temporary hold in appropriate circumstances to establish and maintain written supervisory procedures reasonably designed to achieve compliance with the Rule, including procedures on the identification, escalation and reporting of matters related to financial exploitation of specified adults.[44] The Proposal would require that the member's written supervisory procedures identify the title of each person authorized to place, terminate or extend a temporary hold on behalf of the member

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42 See proposed Rule 2165(b)(3). As discussed below, Partial Amendment No. 1 clarifies that a member may place a temporary hold for up to 25 business days when the Rule's requirements are met, unless the temporary hold is "otherwise" terminated or extended by a state regulator or agency of competent jurisdiction or a court of competent jurisdiction.

43 See proposed Rule 2165(d).

44 See proposed Rule 2165(c)(1).

pursuant to the Rule.[45] The Proposal would also require a member that anticipates placing a temporary hold pursuant to the Rule to develop and document training policies or programs reasonably designed to ensure that associated persons comply with the requirements of the Rule.[46]

C. Partial Amendment No. 1

As discussed in FINRA's response to comments, infra, Partial Amendment No. 1 makes the following changes to the Proposal: (1) it clarifies the scope of Supplementary Material .01 to Rule 2165 by adding the words "associated persons" to the Proposal's safe harbor, and by providing that the safe harbor is available when members exercise discretion in placing a temporary hold "consistent with the requirements of this Rule;" (2) it clarifies that a member may place a temporary hold for up to 25 business days when the Rule's requirements are met, unless the temporary hold is "otherwise" terminated or extended by a state regulator or agency of competent jurisdiction or a court of competent jurisdiction; (3) it provides an exception from the proposed requirement in Rule 2165 to notify not later than two business days after placing a temporary hold all parties authorized to transact business on an account if a party is unavailable or if the member reasonably believes that the party has engaged, is engaged, or will engage in the financial exploitation of a Specified Adult; and (4) it extends the Proposal's implementation period from "no later than 180 days following Commission approval" to 12 months from Commission approval.

III. Summary of Comments and FINRA's Responses

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45 See proposed Rule 2165(c)(2).

46 See proposed Supplementary Material .02 to Rule 2165.

The Commission received twenty-one (21) comment letters on the Proposal,[47] and a response letter from FINRA.[48] Twenty (20) commenters supported FINRA's efforts to protect seniors and other vulnerable adults but offered suggested modifications as to various aspects of the Proposal.[49] The remaining commenter supported the proposed amendments to Rule 4512 regarding a trusted contact person, but opposed the proposed adoption of Rule 2165 that would permit temporary holds on disbursements where there is a reasonable belief of financial exploitation.[50] Commenters' concerns and suggested modifications to the Proposal, along with FINRA's corresponding responses, are discussed by topic below.

A. Comment Letters in Support of the Proposal

As noted above, twenty (20) commenters generally supported FINRA's Proposal.[51] For instance, one commenter stated that adoption of FINRA's Proposal would better enable its members "to protect seniors and other vulnerable adults from financial exploitation," and "to reach out to a trusted contact person whenever the member suspects financial exploitation of the account holder or when the member has concerns about the account holder's ability to continue to handle his or her financial affairs."[52] Another commenter stated that the Proposal was "well-conceived to help member firms protect seniors."[53] A third commenter asserted that its members

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47 See supra note 5.

48 See supra note 7.

49 See ACLI, BDA, CAI, Edward Jones, GSU, FSI, FSR, ICI, Investor Advocate, IRI, Janney, Lincoln, LPL, NAIFA, NASAA, PIABA, PIRC, SIFMA, Thomson Reuters and Wells Fargo.

50 See Cornell.

51 See supra note 46.

52 See ICI.

53 See Janney.

had been trying to obtain trusted contact person information, and that the Proposal would provide additional guidance to members, create uniform practices, and make customers more willing to provide the information.[54] This commenter also supported the proposed temporary hold on disbursements, which, it argued, would facilitate quick protection for vulnerable adults, while promptly resolving concerns that might be unfounded.[55]

However, these twenty (20) commenters suggested modifications to the Proposal. These suggested modifications, along with FINRA's responses to the commenters, are addressed below.

B. Suggested Modifications to the Proposal

1. Trusted Contact Person

As noted above, the Proposal would amend Rule 4512 to require members to make reasonable efforts to obtain the name of and contact information for a trusted contact person upon the opening of a non-institutional customer's account. One commenter contended that, if a customer refuses to provide the trusted contact person information, Rule 4512 should require a member to maintain records of its reasonable efforts to obtain the trusted contact person information and the customer's refusal to provide the information.[56] The commenter also believed that the rule text should set forth the minimum contact information that must be obtained (i.e., a name, telephone number, mailing address, email and relationship to customer) and that the information should be added to FINRA's new account application template.[57]

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54 See FSI.

55 Id.

56 See PIRC.

57 Id.

In its Response Letter, FINRA acknowledged that Rule 4512 does not specify the manner in which members should evidence compliance with the rule, or what contact information should be obtained for a trusted contact person.[58] However, according to FINRA, because Rule 3110 (Supervision) requires members to have supervisory procedures in place that are reasonably designed to achieve compliance with FINRA rules, members would have the flexibility to reasonably design their supervisory systems to achieve compliance with the Proposal's requirements.[59] To aid members in complying with the Proposal's requirements, FINRA agreed to update its new account application template to reflect the proposed amendments to Rule 4512.[60]

a. Notification of Designation

One commenter suggested modifying the proposed amendments to Rule 4512 to require members to notify an individual that he or she was named as a trusted contact person.[61] Another commenter recommended that members voluntarily adopt a practice of notifying the trusted contact person of his or her designation.[62]

In response, FINRA states its belief that the "administrative burdens of requiring notification would outweigh the benefits."[63] However, FINRA notes that a member may elect to

58 See FINRA Response Letter.

59 Id.

60 Id.

61 See GSU.

62 See Investor Advocate.

63 See FINRA Response Letter.

notify a trusted contact person of his or her designation (e.g., if the member determines that notifying the trusted contact person may be helpful in administering a customer account).[64]

b. Notification of Temporary Hold

As discussed above, proposed Rule 2165 would require a member to provide notification of a temporary hold and the reason for the hold to the trusted contact person, if available, not later than two business days after the date that the member first placed the hold. One commenter recommended voluntary, rather than mandatory, notification,[65] while another asserted that a member should not be required to notify the trusted contact person if the member determines to lift the hold after speaking with all persons authorized to transact business on the account.[66]

In response, FINRA encourages members to attempt to resolve a matter with a customer before placing a temporary hold, "unless a member reasonably believes that doing so would cause further harm to a specified adult."[67] According to FINRA, if a temporary hold is not placed, there is no requirement in the rule to notify the trusted contact person.[68] However, once a member places a temporary hold on a disbursement, FINRA believes a member should be required to notify a trusted contact person.[69] In addition, FINRA strongly encourages members to notify the specified adult of the temporary hold as soon as practicable but in no case longer than the two business days required by Rule 2165.[70]

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64 Id.

65 See SIFMA.

66 See FSR.

67 See FINRA Response Letter.

68 Id.

69 Id.

70 Id.

Another commenter suggested that, rather than disclosing only that the temporary hold was placed, members should have discretion to disclose and discuss any information relevant to the financial exploitation investigation to the trusted contact person.[71] In its Response Letter, FINRA states that "the proposed amendments to Rule 4512 explicitly permit members to contact the trusted contact person and disclose information about the customer's account to address possible financial exploitation and as permitted by Rule 2165."[72] According to FINRA, members are therefore permitted to disclose and discuss information relevant to a financial exploitation investigation to a trusted contact person.[73]

c. Update

As previously discussed, with respect to an account that was opened pursuant to a prior FINRA rule ("existing account"), Rule 4512(b) requires members to update the trusted contact information for the account whenever they update the account information in the course of their routine and customary business, or as required by other applicable laws or rules. One commenter recommended a shorter recurring timeframe (e.g., annually) during which members must reach out to their non-institutional customers regarding the trusted contact person information.[74] In response, FINRA declined to make the suggested change.[75] FINRA states that applying the current standard in Rule 4512(b) to the trusted contact person information would ensure that members use reasonable efforts to obtain the information for existing accounts in the

71 See IRI.

72 See FINRA Response Letter.

73 Id.

74 See PIRC.

75 See FINRA Response Letter.

course of their routine business, while not imposing undue burdens on members to contact accountholders more frequently.[76]

With respect to any account subject to the requirements of Exchange Act Rule 17a-3(a)(17) to periodically update customer records, proposed Supplementary Material .06(c) to Rule 4512 would require a member to make reasonable efforts to obtain or, if previously obtained, to update where appropriate the name of and contact information for a trusted contact person consistent with the requirements in Rule 17a-3(a)(17).[77] One commenter requested clarification on how the update requirement would apply to automated compliance processes or tech platforms that permit a client to voluntarily change information at their convenience.[78] In response, FINRA states that the requirements of Rule 17a-3(a)(17) apply to a wide range of account information and would not be unique to trusted contact person information.[79] For any account subject to Rule 17a-3(a)(17), FINRA believes that any automated compliance process or tech platform would need to comply with the requirements of Rule 17a-3(a)(17).[80]

Another commenter requested confirmation that the obligation to obtain trusted contact person information for existing accounts in the course of the member's routine and customary business would be satisfied where the member updated the account within the 36-month period

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76 Id.

77 The Commission notes that, while FINRA Rule 4512 would impose on accounts subject to the requirements of Rule 17a-3(a)(17) a requirement to update trusted contact information, Rule 17a-3(a)(17) by its terms imposes no independent requirement to do so, and Rule 4512 has no effect on a member's obligations under Rule 17a-3(a)(17).

78 See SIFMA.

79 See FINRA Response Letter.

80 Id.

in accordance with the requirements of Rule 17a-3(a)(17)(i)(D).[81] In response, FINRA states that, consistent with the requirements of Rule 4512(b) discussed above, the requirement to update the account information may be triggered earlier than the 36-month period if the member updates the information for the account either in the course of the member's routine and customary business or as otherwise required by applicable laws or rules.[82]

2. Safe Harbor

As set forth in the Proposal, Supplementary Material .01 to Rule 2165 states that members will be provided a safe harbor from FINRA Rules 2010, 2150 and 11870 when members exercise discretion to place temporary holds on disbursements of funds or securities from the accounts of specified adults under the circumstances denoted in the Rule. Rather than providing a safe harbor when members choose to place temporary holds, three commenters supported requiring members to place temporary holds where there is a reasonable belief of financial exploitation.[83] In response, FINRA states its belief that a member can better protect its customers from financial exploitation if the member can use its discretion in placing a temporary hold on a disbursement of funds or securities from a customer's account.[84] Accordingly, FINRA declined to make the suggested change.[85]

One commenter requested that the safe harbor language be moved into the body of the rule text and the protection be extended to registered representatives of the member.[86] In its

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81 See FSR.

82 See FINRA Response Letter.

83 See GSU, PIABA, and PIRC.

84 See FINRA Response Letter.

85 Id.

86 See NAIFA.

Response Letter, FINRA states that, because Supplementary Material is part of the rule, it would not move the language as requested.[87]

Two commenters requested that the Supplementary Material be revised to explicitly state that the safe harbor applies to associated persons.[88] In response, and as discussed in Partial Amendment No. 1, FINRA is proposing to incorporate associated persons into the rule text, which is consistent with FINRA's original interpretation of the scope of the safe harbor.[89] FINRA states that, as amended, proposed Supplementary Material .01 to Rule 2165 would explicitly provide that members and their associated persons have 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 consistent with the requirements of Rule 2165.[90]

Another commenter suggested that the inclusion of Rules 2010 and 2150 in Supplementary Material .01 would create protections far beyond the scope of what is necessary to encourage members to act on financial exploitation.[91] In response, FINRA states its belief that it is appropriate to include Rules 2010 and 2150 in Supplementary Material .01, as the rules may be implicated by a member's exercise of discretion to place a temporary hold on a disbursement.[92] This same commenter also suggested that when a member exercises discretion and chooses not to place a hold, then the member should not be granted a safe harbor from duties

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87 See FINRA Response Letter.

88 See FSR and Wells Fargo.

89 See FINRA Response Letter.

90 Id.

91 See GSU.

92 See FINRA Response Letter.

that they would otherwise have under FINRA rules.[93] In response, and as noted above, FINRA states that the proposed safe harbor does not apply to a decision not to place a hold; rather, proposed Rule 2165 explicitly states that it provides members with a safe harbor under FINRA rules when members exercise discretion in placing a temporary hold on disbursements of funds or securities.[94]

Another commenter requested revising Rule 2165 to clarify that a member's failure to place a hold on a customer account shall not be deemed to be an abrogation of the member's duties under FINRA rules.[95] In its Response Letter, FINRA asserts that Supplementary Material .01 clearly states that proposed Rule 2165 contains a safe harbor, and that the Rule does not require placing a hold on a disbursement.[96]

Three commenters suggested that any associated person acting in good faith should not be subject to complaints reportable on Form U4 (Uniform Application for Securities Industry Registration or Transfer), and that the safe harbor should be extended to include FINRA Rule 4530 (Reporting Requirements).[97] In its Response Letter, FINRA states that the proposed safe harbor from FINRA rules would not extend to complaints about an associated person that are reportable on Form U4.[98] However, FINRA notes that an associated person may respond to any such complaints on Form U4, including with an explanation of actions taken pursuant to

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93 See GSU.

94 See FINRA Response Letter.

95 See ICI.

96 See FINRA Response Letter.

97 See BDA, Janney, and SIFMA.

98 See FINRA Response Letter.

proposed Rule 2165.[99] FINRA further states that the proposed safe harbor from FINRA rules would also not extend to reporting required pursuant to Rule 4530, although FINRA would consider whether a member or associated person had acted consistent with the proposed rule when FINRA assesses reported information about a hold on a disbursement.[100]

Lastly, a commenter stated that members may be subject to FINRA sanctions (outside of Rules 2010, 2150 and 11870 violations) and private claims, and requested that FINRA extend the safe harbor to cover FINRA sanctions and private claims for members' reasonable determinations regarding whether or not to place a temporary hold on a disbursement. [101] Another commenter suggested that the safe harbor be extended to cover protection against liability for actions taken in connection with notifying the appropriate state authorities of financial exploitation.[102] In response, FINRA states that proposed Rule 2165 is designed to provide regulatory relief to members by providing a safe harbor from FINRA rules for a determination to place a temporary hold.[103] Nevertheless, some states may separately provide immunity to members under state law.[104]

3. Transactions

Six commenters supported extending the scope of proposed Rule 2165 to apply to transactions.[105] In its Response Letter, FINRA states that, although proposed Rule 2165 does not

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99 Id.

100 Id.

101 See CAI.

102 See NAIFA.

103 See FINRA Response Letter.

104 Id.

105 See FSI, IRI, Janney, Reuters, SIFMA and Wells Fargo.

apply to transactions, FINRA may consider extending the safe harbor to transactions in securities in future rulemaking.[106]

4. Diminished Capacity

Two commenters suggested extending the safe harbor beyond financial exploitation to address a customer's diminished capacity.[107] In its Response letter, FINRA recognizes the challenges members face in addressing diminished capacity and that this is an important issue for further consideration, and that it can make seniors especially vulnerable to financial exploitation.[108] FINRA states that a member could contact a trusted contact person if it suspects that the customer may be suffering from Alzheimer's disease, dementia or other forms of diminished capacity.[109] FINRA further believes that a person with diminished capacity would generally qualify as a "specified adult" as defined by proposed Rule 2165(a)(1)(B).[110]

5. Specified Adults

Proposed Rule 2165 would define "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. With respect to persons younger than age 65, two commenters suggested revising the definition to cover other vulnerable persons (e.g., persons who would be deemed vulnerable under state statute).[111] In response, FINRA states its belief that the suggested change would present

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106 See FINRA Response Letter.

107 See Lincoln and SIFMA.

108 See FINRA Response Letter.

109 Id.

110 Id.

111 See NASAA and PIRC.

operational challenges for members, as the customers covered by the definition would vary by jurisdiction.[112] Furthermore, FINRA recognizes that customers who do not have a physical or mental impairment may also be vulnerable; however, proposed Rule 2165 is intended to cover those customers most susceptible to financial exploitation.[113] As such, FINRA declined to make the suggested change at this time.[114]

Another commenter suggested revising proposed Supplementary Material .03 to Rule 2165 to provide that belief of impairment shall not create an assumption or implication that a member or its associated persons are qualified to make, or responsible for making, determinations about impairment.[115] As stated in its Response Letter, FINRA declined to revise the rule text as suggested because FINRA does not intend proposed Rule 2165 to create an assumption or implication that a member or its associated persons are qualified to make impairment determinations beyond the limited purposes of the proposed rule.[116] FINRA states that the "reasonable belief" standard required by proposed Rule 2165 for a member to place a temporary hold imposes no such requirement.[117]

6. Account

As noted above, proposed Rule 2165 would define "account" to mean any account of a member for which a specified adult has the authority to transact business. One commenter suggested that the definition of "account" may be overly broad, and suggested clarifying that

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112 See FINRA Response Letter.

113 Id.

114 Id.

115 See NAIFA.

116 See FINRA Response Letter.

117 Id.

transactions in securities, such as variable insurance products, sold by a broker-dealer, but not custodied in a brokerage account, are not subject to proposed Rule 2165.[118] In response, FINRA states that proposed Rule 2165 applies to disbursements of funds or securities out of a customer account, and does not apply to transactions in securities.[119]

7. Disbursements

Two commenters expressed concern that a temporary hold pursuant to proposed Rule 2165 may not comply with the requirements of Section 22(e) of the Investment Company Act of 1940 ("1940 Act").[120] FINRA states in response that most mutual fund customer accounts are serviced and record-kept by intermediaries.[121] According to FINRA, in the small proportion of circumstances where mutual fund customers purchase shares directly from the mutual fund, the customer's account may be maintained by a mutual fund's principal underwriter.[122] Based on discussions with SEC staff, FINRA does not believe that a broker-dealer's delay of a disbursement of mutual fund redemption proceeds to its customers in reliance on proposed Rule 2165 and based on a reasonable belief of financial exploitation of the customer would be imputed to the mutual fund, including where the broker-dealer is the fund's principal underwriter.[123] However, this conclusion is limited to situations where the mutual fund does not have a role in the disbursement of redemption proceeds from the customer's account held by the

118 See ACLI.

119 See FINRA Response Letter.

120 See CAI and Lincoln.

121 See FINRA Response Letter.

122 Id.

123 Id.

broker-dealer, including any role in the decision to delay the disbursement of funds in reliance on proposed Rule 2165.[124]

Another commenter requested clarification on how ACATS transfers would be treated under proposed Rule 2165.[125] For purposes of proposed Rule 2165, FINRA responds that it would consider disbursements to include ACATS transfers but, as with any temporary hold, a member would need to have a reasonable belief of financial exploitation in order to place a temporary hold on the processing of an ACATS transfer request pursuant to the Rule.[126] FINRA recognizes that, depending on the facts and circumstances, placing a temporary hold on the processing of an ACATS transfer request could also lead the member to place a temporary hold on all assets in an account, for the same reasons.[127] However, according to FINRA, if a temporary hold is placed on the processing of an ACATS transfer request, the member must permit disbursements from the account where there is not a reasonable belief of financial exploitation regarding such disbursements.[128] FINRA also reminds members of the application of FINRA Rule 2140 (Interfering with the Transfer of Customer Accounts in the Context of Employment Disputes) to the extent that there is not a reasonable belief of financial exploitation.[129]

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124 Id.

125 See SIFMA.

126 See FINRA Response Letter.

127 Id.

128 Id.

129 Id.

Another commenter requested clarification on where funds from a disbursement subject to a temporary hold should be maintained by a member.[130] FINRA responds that, while the temporary hold on a disbursement is in effect, the funds or securities would remain in a customer's account and would not be released.[131]

8. Persons Permitted to Place Temporary Holds

Proposed Rule 2165 would provide that a member may place the hold on a disbursement, provided that the member's written supervisory procedures identify the title of each person authorized to place, terminate or extend a hold on behalf of the member and that each such person be serving in a supervisory, compliance or legal capacity for the member. One commenter suggested expanding the categories of persons authorized to place holds on behalf of a member to include persons who have been designated by the member to review cases involving specified adults as part of the member's escalation process.[132] In its Response Letter, FINRA states that, while the benefits of preventing financial exploitation are significant to both the member and customer, placing a temporary hold on a disbursement is a serious action on the part of a member and may lead to difficult but necessary conversations with customers that could impact the member-customer relationship.[133] FINRA believes that the current form of proposed Rule 2165 promotes administrative clarity, that it is reasonable to limit authority for placing holds on disbursements to a select group of individuals associated with the member, that persons serving in a supervisory, compliance or legal capacity are well positioned to make these determinations on behalf of the member, and that such a limitation is not a substantial burden to

130 See ACLI.

131 See FINRA Response Letter.

132 See SIFMA.

133 See FINRA Response Letter.

members that wish to rely on the rule's safe harbor provision.[134] Accordingly, FINRA declined to make the suggested revision.[135]

9. Period of Temporary Hold

As set forth in the Proposal, the temporary hold authorized by proposed Rule 2165 would expire not later than 15 business days for any initial period and up to 10 business days in any subsequent period after the date that the member first placed the temporary hold on the disbursement of funds or securities, unless sooner terminated or extended by an order of a state regulator or agency or court of competent jurisdiction. Two commenters suggested that the time periods may not be adequate to give state regulators and agencies or courts time to take action on a matter.[136] Another commenter suggested that regulatory approval be required prior to extending a temporary hold beyond the initial 15 business day period.[137] FINRA responds that, in proposing the time periods, it has tried to strike a reasonable balance in giving members adequate time to investigate and contact the relevant parties, seeking input from a state regulator or agency or a court order if needed, but also not permitting an open-ended or overly long hold period in recognition of the seriousness of placing a temporary hold on a disbursement.[138]

Another commenter stated that the rule text, as set forth in the Proposal, could be read to require the termination or extension of the temporary hold by the state regulator or agency of competent jurisdiction or a court of competent jurisdiction prior to the initial hold being extended

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134 Id.

135 Id.

136 See IRI and PIRC.

137 See NASAA.

138 See FINRA Response Letter.

for an additional 10 business day period.[139] In response, FINRA states that it did not intend to impose any such limitation.[140] As discussed in the Partial Amendment No. 1, FINRA states that it is proposing to revise Rule 2165(b)(2) and (3) to provide that a member may place a temporary hold for up to 25 business days when the Rule's requirements are met, unless the temporary hold is "otherwise" terminated or extended by a state regulator or agency of competent jurisdiction or a court of competent jurisdiction.[141] According to FINRA, this proposed change is intended to recognize that a state regulator or agency or a court may terminate or extend a hold on a disbursement at any time during the time period provided by proposed Rule 2165(b)(2) and (3).[142]

One commenter suggested that Rule 2165 should explicitly provide that a member must terminate a temporary hold as soon as the member's internal review of the facts and circumstances that were the basis for the hold does not support a reasonable belief that financial exploitation is occurring or is attempted.[143] In response, FINRA states that it declines to revise the rule text as suggested, but that it would expect a member to lift a temporary hold when it no longer has a reasonable belief of financial exploitation (e.g., when subsequent events indicate that the threat of financial exploitation no longer exists).[144]

10. Notifying All Parties Authorized to Transact Business

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139 See SIFMA.

140 See FINRA Response Letter.

141 Id.

142 Id.

143 See ICI.

144 See FINRA Response Letter.

Under proposed Rule 2165(b)(1)(B)(i), a member is required to notify all parties authorized to transact business on an account of the temporary hold and the reason for the temporary hold when the member places a temporary hold on a disbursement. Two commenters expressed concern that the rule text does not contemplate a party being unavailable, and that notifying all parties could lead to increased risk for the customer where a party is the suspected perpetrator of the financial exploitation.[145] The commenters suggested providing an exception from the notification requirement where a party is unavailable or where the member reasonably suspects that a party has engaged, is engaged, or will engage in the financial exploitation of the Specified Adult.[146] In response, FINRA states its belief that, although a member will need to exercise discretion in forming a reasonable belief that a party authorized to transact business on an account is engaged in the financial exploitation, FINRA also believes it is appropriate to provide an exception from contacting a party authorized to transact business on an account that is comparable to the exception provided for notifying a customer's trusted contact person.[147] As stated in Partial Amendment No. 1, FINRA is proposing to amend Rule 2165(b)(1)(B)(i) to provide that a member is required to notify all parties authorized to transact business on an 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.[148]

Another commenter suggested that requiring notification of all parties authorized to transact business on an account could inadvertently interfere with the ability to use the safe

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145 See LPL and SIFMA.

146 Id.

147 See FINRA Response Letter.

148 Id.

harbor in Rule 2165 if a member has trouble locating one or more authorized parties.[149] In its Response Letter, FINRA states it does not believe that the notification requirement should impact a member's decision to place a hold as it is a post-hold obligation.[150]

11. Notifying Immediate Family Member

Due to the privacy and operational challenges noted by commenters in response to the proposal in Regulatory Notice 15-37, the Proposal did not require notifying an immediate family member when a temporary hold is placed. Three commenters supported removing the requirement to contact an immediate family member.[151] One commenter agreed that requiring a member to contact an immediate family member may be overly restrictive and result in privacy issues, but suggested that the safe harbor be expanded to cover instances in which a member uses its discretion to contact a person reasonably believed to be connected with the account owner when the trusted contact person is unavailable.[152] In its Response Letter, FINRA states that expanding proposed Rule 2165 to authorize members to contact any person reasonably believed to be connected with an account owner may create the same privacy and operational challenges raised by commenters to Regulatory Notice 15-37.[153] However, FINRA states that proposed Rule 2165 would not preclude a member from contacting an immediate family member or any other person provided that the member has customer consent to do so.[154]

12. Notification Period

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149 See IRI.

150 See FINRA Response Letter.

151 See GSU, IRI and NASAA.

152 See Wells Fargo.

153 See FINRA Response Letter.

154 Id.

Proposed Rule 2165 would require the member to provide notification of the temporary hold and the reason for the hold to all parties authorized to transact business on the account and the trusted contact person, if available, no later than two business days after placing the hold. Three commenters suggested extending the time period for notification beyond two business days.[155] FINRA declined to extend the time period for notification beyond two business days, given its belief in the need for urgency in dealing with financial exploitation and to remain consistent with the NASAA model state act.[156]

13. Privacy Considerations

Three commenters requested clarification on what information may be shared pursuant to the Proposal without violating Regulation S-P.[157] In response, FINRA states that disclosures to a trusted contact person pursuant to proposed Rules 2165 and 4512(a)(1)(F) would be consistent with Regulation S-P, because such disclosures would be made with customers' consent or authorization,[158] to protect against fraud or unauthorized transactions, or to comply with federal, state, or local laws, rules and other applicable legal requirements, including the requirements of Rule 2165.[159]

14. Policies and Procedures

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155 See CAI, IRI and SIFMA.

156 See FINRA Response Letter.

157 See BDA, CAI and FSR.

158 FINRA notes that, under the Proposal, members would be required to disclose to customers the purposes for obtaining the trusted contact information, including the possible disclosure of account information to a trusted contact in specified circumstances, and customers would authorize or consent to such disclosure by voluntarily providing the trusted contact information. See FINRA Response Letter.

159 See FINRA Response Letter. The Commission staff confirmed the accuracy of this interpretation during discussions with FINRA.

Proposed Rule 2165 would require a member that anticipates using a temporary hold in appropriate circumstances to establish and maintain written supervisory procedures reasonably designed to achieve compliance with the Rule, including, but not limited to, procedures on the identification, escalation and reporting of matters related to financial exploitation of specified adults. One commenter suggested requiring all members to establish and maintain written supervisory procedures reasonably designed to achieve compliance with the Rule.[160] In its Response Letter, FINRA states that, because placing a temporary hold is discretionary, not mandatory, FINRA declines to make the suggested change.[161]

Another commenter recommended requiring the written supervisory procedures to include provisions designed to ensure that the member lifts a temporary hold as soon as practicable after the member conducts an internal review and finds that the hold is not warranted.[162] As noted above, FINRA expects that a member would lift a temporary hold when it no longer has a reasonable belief of financial exploitation.[163] This same commenter also suggested that it is unclear whether the member can freeze all owners' access to the account, and recommended that FINRA require a member's written supervisory procedures to include provisions regarding the impact of a temporary hold on those joint account owners who are not believed to be the subject of financial exploitation.[164] In response, FINRA states that Proposed Rule 2165 would permit placing a temporary hold only where there is a reasonable belief of

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160 See PIRC.

161 See FINRA Response Letter.

162 See ICI.

163 See FINRA Response Letter.

164 See ICI.

financial exploitation and only with regard to a specific disbursement(s).[165] Accordingly, FINRA declined to make the suggested change.[166]

15. Training

The Proposal would require members to develop and document training policies or programs reasonably designed to ensure that associated persons comply with the requirements of Rule 2165. One commenter supported applying the training requirement to associated persons, but suggested that FINRA should oversee training, including incorporating into its FINRA Rule 1250 (Continuing Education Requirements) training a module on the requirements of the Proposal and recognizing financial exploitation of vulnerable adults.[167] In its Response Letter, FINRA states that the Proposal provides members with reasonable discretion in determining how best to structure their training policies or programs.[168] FINRA states that, while it has developed material for the Continuing Education Regulatory Element Program that addresses the financial exploitation of senior investors, members are responsible for developing and documenting their training policies and programs.[169] FINRA states that it will consider whether to develop additional continuing education content specifically addressing financial exploitation of seniors and providing additional guidance to members, as appropriate.[170]

16. Reporting

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165 See FINRA Response Letter.

166 Id.

167 See GSU.

168 See FINRA Response Letter.

169 Id.

170 Id.

One commenter supported not requiring as part of proposed Rule 2165 that members report financial exploitation to local adult protective services and law enforcement, asserting that such a permissive approach would allow firms and advisors to undertake a reasonable inquiry and to decide whether or not to freeze an account without considering their own potential liability.[171] In contrast, several other commenters recommended revising proposed Rule 2165 to require members to report financial exploitation to state and local authorities, such as adult protective services and law enforcement, or FINRA.[172] One such commenter also supported requiring members to provide any account information requested by state and local authorities to conduct their investigations.[173] Another suggested clarifying in Supplementary Material to Rule 2165 how members should coordinate with a state regulator or agency to confirm or validate suspicions regarding financial exploitation.[174]

In its Response Letter, FINRA states that, while proposed Rule 2165 does not require members to report a reasonable belief of financial exploitation to a state or local authority, some states mandate such reporting by financial institutions, including broker-dealers.[175] Given the varying and evolving reporting requirements under state law, FINRA believes that states are well positioned to determine whether a broker-dealer or any other entity has satisfied its reporting requirements under state law.[176] FINRA states that it would expect members to comply with all applicable state requirements, including reporting requirements, and FINRA staff may request

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171 See FSI.

172 See Investor Advocate, NAIFA, NASAA and PIABA.

173 See Investor Advocate.

174 See FSR.

175 See FINRA Response Letter.

176 Id.

records related to state reporting as part of the examination process.[177] Even where a state may not require such reporting, FINRA believes that members may find it beneficial to contact relevant state agencies, such as state securities regulators or state or local adult protective services, to assist in resolving matters involving possible financial abuse.[178]

17. Implementation Period

If the Commission approves the Proposal, some commenters requested that members have from 12 to 18 months to implement the requirements.[179] As a general matter, these commenters noted that additional time is needed to make all of the necessary adjustments to their internal systems, including updates needed to incorporate the trusted contact person-related requirements. As discussed in the Partial Amendment No. 1, FINRA states it has determined to extend the implementation period before effectiveness from "no later than 180 days following Commission approval" to 12 months from Commission approval.[180] FINRA intends this extended period of implementation to provide members more time to commit the necessary resources to implement the Proposal.[181] FINRA believes this change is an appropriate balance of the commenters' concerns and the strong desire to provide tools to members to address possible financial exploitation under the Proposal as soon as practicable.[182]

C. Opposition to Proposed Rule 2165

177 Id.

178 Id.

179 See BDA, Edward Jones, FSR, LPL, Reuters, SIFMA and Wells Fargo.

180 See FINRA Response Letter.

181 Id.

182 Id.

One commenter supported the proposed amendments to Rule 4512 regarding a trusted contact person, but opposed the proposed adoption of Rule 2165 that would permit temporary holds on disbursements where there is a reasonable belief of financial exploitation.[183] This commenter asserted, among other things, that the "reasonable belief" standard for placing the temporary hold was "too low relative to the potential harm to a customer from not being able to withdraw funds or securities," and that, absent a clearer standard, "Rule 2165 creates an incentive to place a hold on an account as the default response to concerns about a specified adult."[184] In its Response Letter, FINRA states that it believes the Proposal is needed to provide members with a "defined" way to respond to situations where there is a reasonable belief of financial exploitation of seniors and other vulnerable adults, including the ability to share customer information with a trusted contact person.[185] Furthermore, FINRA believes that the Proposal would promote investor protection by providing members with a safe harbor from FINRA rules that might otherwise discourage them from exercising discretion to protect customers through placing a temporary hold on disbursements of funds or securities.[186]

IV. Solicitation of Comments on Partial Amendment No. 1

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended by Partial Amendment No. 1, 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

183 See Cornell.

184 Id.

185 See FINRA Response Letter.

186 Id.

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-FINRA-2016-039 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-FINRA-2016-039. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2016-039 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Discussion and Commission Findings

The Commission has carefully considered the Proposal, the comments received, FINRA's

response to the comments, and Partial Amendment No. 1. Based on its review of the record, the Commission finds that the Proposal, as modified by Partial Amendment No. 1, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities association.[187] In particular, the Commission finds that the Proposal, as modified by Partial Amendment No. 1, is consistent with Section 15A(b)(6) of the Exchange Act,[188] which requires, among other things, that FINRA's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

As discussed above, the Proposal, as modified by Partial Amendment No. 1, would: (1) require members to make reasonable efforts to obtain the name of and contact information for a trusted contact person for a customer's account; and (2) permit members to place temporary holds on disbursements of funds or securities from the accounts of specified customers, where there is a reasonable belief that these customers have been, are being, or will be subject to financial exploitation.

The Commission has considered the twenty-one (21) comment letters received on the Proposal,[189] along with FINRA's Response Letter, and Partial Amendment No. 1.[190] The Commission acknowledges the supportive commenters' positions, such that adoption of the Proposal would better enable FINRA members "to protect seniors and other vulnerable adults

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187 In approving the Proposal, as modified by Partial Amendment No. 1, the Commission has also considered its impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

188 15 U.S.C. 78o-3(b)(6).

189 See supra note 5.

190 See supra note 7.

from financial exploitation,"[191] that the Proposal was "well-conceived to help member firms protect seniors,"[192] and that it would provide additional guidance to members, create uniform practices, and make customers more willing to provide trusted contact information.[193]

The Commission also acknowledges commenters' concerns and recommended modifications to the Proposal. However, it also notes that FINRA's response to comments addresses many of these concerns, and offers additional clarifications regarding FINRA's expectations regarding the operation of the Proposal. For example, FINRA clarified that the notification requirement is a post-hold obligation, and that the proposed safe harbor does not apply to a decision not to place a hold. FINRA also addresses a concern of several commenters through its proposed partial amendment, which makes explicit in the rule text that associated persons are covered by the rule's safe harbor, a position FINRA indicated is consistent with its original interpretation of the scope of the safe harbor. Throughout its response to comments, FINRA has emphasized its attempts to balance members' operational practicalities with the serious investor protection concerns raised both by the specter of financial exploitation and the seriousness of placing a temporary hold on a disbursement. Moreover, FINRA has addressed commenters' questions about the intersection of the Proposal with both Section 22(e) of the 1940 Act, and with Regulation S-P, based on its discussions with Commission staff.

Taking into consideration the comments and FINRA's responses, the Commission finds that the Proposal is consistent with the Exchange Act. Specifically, the Commission believes that the Proposal will protect investors and the public interest by, among other things, providing

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191 See ICI.

192 See Janney.

193 See FSI.

FINRA members with means by which they can respond to situations where there is a reasonable belief of financial exploitation of seniors and other vulnerable adults. The Commission additionally believes that the Proposal will promote investor protection by providing FINRA members with a safe harbor from the purported violation of certain FINRA rules, without which such members might otherwise be discouraged from placing a temporary hold on disbursements of funds or securities where there is a reasonable belief of financial exploitation.

The Commission believes that FINRA's responses, as discussed in more detail above, appropriately addressed commenters' concerns and adequately explained FINRA's reasons for modifying or declining to modify its Proposal. Accordingly, the Commission believes that the approach proposed by FINRA is appropriate and designed to protect investors and the public interest, consistent with Section 15A(b)(6) of the Exchange Act and the rules and regulations thereunder.

VI. Conclusion

IT IS THEREFORE ORDERED pursuant to Section 19(b)(2)[194] of the Exchange Act that the proposed rule change (SR-FINRA-2016-039), as modified by Partial Amendment No. 1, be and hereby is approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[195]

Eduardo A. Aleman
Assistant Secretary

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194 Id.

195 17 CFR 200.30-3(a)(12).

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