

COMMENT LETTER

November 25, 2016

ICI Files Comment Letter with SEC Supporting FINRA Rules to Protect Senior Investors (pdf)

November 28, 2016 Brent J. Fields, Secretary U.S. Securities and Exchange Commission 100 F Street, N.E. Washington, DC 20549-1090 Re: FINRA Proposal Relating to Rules 4512 and 2165; File No. SR-FINRA-2016-039 Dear Mr. Fields: The Investment Company Institute¹ (the “Institute”) is writing to support the adoption of FINRA’s proposal to revise FINRA Rule 4512, relating to customer account information, and to adopt new Rule 2165, relating to the financial exploitation of specified adults.² The Institute supports adoption of FINRA’s proposal because it will better enable FINRA’s members to protect seniors and other vulnerable adults from financial exploitation. It also will provide FINRA members the ability 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. ¹ The Investment Company Institute (ICI) is a leading global association of regulated funds, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI’s US fund members manage total assets of \$18.5 trillion and serve more than 90 million US shareholders. ² 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), SEC Release No 34-79215; File No. SR-FINRA-2016-039 (November 1, 2016) (the “SEC Release”). Brent J. Fields, Secretary November 28, 2016 Page 2 As noted in the SEC Release, when FINRA published its proposal for comment in October 2015, the Institute filed a comment letter supporting it.³ Notwithstanding our support, the Institute’s comment letter raised several concerns relating to how the rules would operate once adopted. The letter also encouraged FINRA to better conform its rules to protect senior investors to those that the North American Securities Administrators Association (“NASAA”) had proposed to protect senior investors from financial abuse and exploitation. [NASAA’s proposal has since been adopted by its members and enacted by some states.] We are pleased that, in response, FINRA revised its proposal to address our concerns and those of other commenters. Among other things, FINRA revised its proposal to: (i) limit the purposes for which a member may reach out to a trusted contact person; (ii) protect the accountholder’s privacy interest by restricting who the member may contact regarding concerns with the account; (iii) limit concerns with the number/duration of freezes placed on an account; (iv) clarify that members are not required to impose freezes; and (v) better

conform the proposal to NASAA's proposal. We appreciate FINRA revising the proposal to address these issues and we continue to support the proposal's adoption. At the same time, we recommend that FINRA give further consideration to the issues discussed below, which also were raised in our previous comment letter.

OWNER'S RIGHT OF RECOURSE In the Institute's previous comment letter to FINRA, we expressed concern with how proposed Rule 2165 might implicate the account owner's due process rights in the event a FINRA member places a temporary hold on disbursements from the account. We also questioned what rights of recourse would be available to the account owner. According to the SEC Release, FINRA's response to this concern noted that, while "customers may be affected by temporary holds, the costs of financial exploitation can be significant and devastating to customers." FINRA added that, to minimize the potential harm to customers that may arise from unnecessarily holding customer funds, "FINRA believes that members should weigh a customer's objection against other information in determining whether a hold should be placed or lifted. While not dispositive, a customer's objection and explanation may indicate to the member that the hold should be lifted."⁴ We appreciate FINRA's consideration of our concern. We continue to believe, however, that Rule 2165 should expressly 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 do not support a reasonable belief that financial exploitation is occurring or being attempted. As currently drafted, the rule only provides that a temporary hold may be terminated before the expiration of 15 business days.

³ See Letter from the undersigned to Marcia E. Asquith, Office of the Corporate Secretary, FINRA, dated November 25, 2015 commenting on Financial Exploitation of Seniors and Other Vulnerable Adults, FINRA Notice 15-37 (October 2015).

⁴ SEC Release at pp. 42-43. Brent J. Fields, Secretary November 28, 2016 Page 3 "by a state regulator or agency of competent jurisdiction or a court of competent jurisdiction." In particular, we recommend that Rule 2165(b)(C)(2) be revised to read as follows: (2) The temporary hold authorized by this Rule will expire not later than 15 business days after the date the member first placed the temporary hold on the disbursement of funds or securities, unless (i) sooner terminated by the member upon a reasonable belief that financial exploitation of the Specified Adult is not occurring or being attempted or (ii) unless such temporary hold is extended by a state regulator or agency of competent jurisdiction or a court of competent jurisdiction, or extended pursuant to paragraph (b)(3) of this Rule. FINRA also should consider revising Rule 2165(c)(1) to require a member's written supervisory procedures under the rule 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. We believe these clarifications will better protect the due process interests of the account holder by ensuring that the member lifts any temporary hold placed on an account as soon as the member determines that the hold is not necessary to protect the account holder from financial exploitation or abuse.

JOINTLY-HELD ACCOUNTS The Institute's comment letter to FINRA recommended that FINRA address the impact of Rule 2165 on jointly-held accounts: The proposed rule also might implicate owners' due process concerns in connection with joint accounts. The [FINRA] Notice is silent on this issue. If a firm suspects exploitation of one of the account owners on a jointly-held account, it is unclear whether the firm can freeze all owners' access to the account. A joint owner who seeks disbursements from the account may be surprised to find that the account is frozen for reasons wholly unrelated to that person. While the proposed rule requires that the firm notify all parties authorized to transact business on the account of the freeze within two business days, it does not address what rights a joint account holder has over the account following the notice. [And yet], once a freeze is placed on the account, it would appear to deny all owners of the account access to the account's assets unless an owner obtains a court order to lift a freeze. This construct would seem unduly

harsh on any joint owners of the account. From the SEC's Release, it does not appear that FINRA considered this concern. We again recommend that it do so. We also recommend that FINRA require a member's written supervisory procedures under subdivision (c) of the rule 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. Brent J. Fields, Secretary November 28, 2016 Page 4 CIVIL LIABILITY CONCERNS To assuage the concerns of FINRA's members about customers impacted by a temporary hold taking civil action against them, the Institute's letter recommended that FINRA add language to Rule 2165 clarifying that (1) FINRA does not require any member to impose a hold on any customer account; and (2) a member's failure to impose a hold on a customer account rule shall not be deemed to be an abrogation of the member's duties under FINRA's rules. As noted above, FINRA has revised the proposed rule to address recommendation (1), above.⁵ Our recommendation (2), however, had not been addressed. To protect FINRA's members from frivolous actions or claims based on a failure to impose a hold, we recommend that FINRA also add language to Supplementary Material .01 affirming that a member's failure to impose a hold shall not be deemed an abrogation of the member's duties under FINRA's rules, unless such failure violates the member's supervisory procedures under Rule 2165(c). * * * We appreciate having the opportunity to share our views on FINRA's proposal with the Commission. If you have any questions regarding them, please do not hesitate to contact the undersigned by phone (202-326-5825) or email (tamara@ici.org). Sincerely, / S/ Tamara K. Salmon Associate General Counsel ⁵ See Supplementary Material .01 to Rule 2165, which FINRA revised to affirm that the rule "does not require members to place temporary holds on disbursements of funds or securities from the Accounts of Specified Adults."