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FMR LLC Legal Department

December 31, 2021

Via e-mail to rule-comments@sec.gov

U.S. Securities and Exchange Commission
100 F Street, NE
Washington DC 20549-1090

Attn: Ms. Vanessa A. Countryman

Re: Proposed Amendments to the Electronic Recordkeeping Requirement for Broker-Dealers, Security-Based Swap Dealers, and Major-Security Based Swap Participants (Release No. 34-93614; File No. S7-19-21)

Dear Ms. Countryman:

Fidelity Investments[1] appreciates the opportunity to comment on the Securities and Exchange Commission's ("SEC") proposed amendments to the electronic recordkeeping and prompt production of records requirements applicable to broker-dealers, security-based swap dealers and major security-based swap participants.[2]

As we have commented in the past, Fidelity strongly supports efforts to modernize the SEC's recordkeeping requirements for broker-dealers and other regulated entities. We have long advocated that the 20+ year old technology-specific recordkeeping rules are obsolete and slowing adoption of innovative technology that firms and investors want to use.[3]

The write once, read many (WORM) recordkeeping requirement was adopted by the SEC in 1997 and has not been substantively reviewed since 2003. In light of the transformative advances in technology that have taken place in the last two decades, the SEC should continue to maintain a rigorous retention standard but adopt a flexible, technology neutral approach that will allow broker-dealers to choose the modern storage technology that best suits their business needs.

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[1] Fidelity and its affiliates are one of the world's leading providers financial services, including investment management, retirement planning, portfolio guidance, brokerage, benefits outsourcing, and other financial products and services to more than 30 million individuals and institutions, as well as through 13,500 financial intermediaries. Fidelity also agrees with the views expressed by the Securities Industry and Financial Markets Association (SIFMA) in their comment letter, and we submit this letter to supplement their views on specific issues.

[2] Electronic Recordkeeping Requirements for Broker-Dealers, Security-Based Swap Dealers, and Major Security-Based Swap Participants, 86 FR 68300 (Dec. 2021), at www.govinfo.gov/content/pkg/FR-2021-12-01/pdf/2021-25840.pdf. ("Proposed Rules").

[3] Of particular note, the recent U.S. Treasury report on *Non-Bank Financials, Fintech, and Innovation* identifies SEC Rule 17a-4 as an obstacle to innovation. The report specifically discusses the inability of financial institutions to use cloud-based data retention systems because of the WORM requirement. See https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation_0.pdf.

Adopting a principles-based, technology-neutral standard would harmonize the SEC broker-dealer standard with existing SEC standards applicable to investment advisers, investment companies and transfer agents.[4] The fixed and locked nature of WORM records make them inefficient for business continuity planning, cybersecurity defenses and post-disaster or cyber event recovery. Further, WORM storage does not easily work with customer-facing communication systems typically used in customer support functions or with social media and interactive applications. Because of these limitations, broker-dealers must maintain multiple backup systems, in addition to WORM, and can be restricted from using modern risk, trading, and communication systems that create dynamic content.[5]

While the Proposed Rules have elements of a principles-based approach, we believe that there are several components of the proposal that are inconsistent with such an approach, as discussed below.

I. Third-party Recordkeeping Undertaking

The Proposed Rules do not address the requirement in Rule 17a-4(i) that regulated entities obtain a third-party recordkeeping undertaking. Fidelity believes that this undertaking requirement is outdated and not in keeping with the current storage approaches and structures relating to recordkeeping cloud services. While Rule 17a-4(i) was likely written with hardcopy (paper) records in mind, it does not specifically mention paper or any other medium. As the brokerage industry (along with its self-regulatory organization, the Financial Industry Regulatory Authority (FINRA)) moves away from maintaining paper records, and is increasingly employing cloud based solutions, this undertaking is now outdated and does not represent current recordkeeping approaches and configurations.

As a practical matter, the major cloud services providers today are not generally in a position to provide such letters of undertaking to firms, citing that providing financial information cloud storage services involves encrypting and indexing of records. If these cloud service providers were to provide a means to grant access to these encrypted records, it would countervail the very important security protections and configurations of cloud storage of financial records. Moreover, undertakings that could be provided by the cloud service providers would not be useful in discovery or records request

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[4] In May 2017 the CFTC replaced its WORM storage requirement, which it adopted in 1999, to harmonize its standard with the SEC with a less prescriptive, principles-based approach. This divergence in regulation creates a competitive disadvantage for broker-dealers due to high expenses associated with WORM retention and an inability to adopt innovative technology for storage. This is magnified for multi-service firms that typically will retain non-broker-dealer records in WORM even when not required to do so because the SEC's requirements applicable to broker-dealers is a practical obstacle to implementing firm-wide data storage modernization. *See* CFTC, 17 CFR Parts 1 and 23 (May 2017), at https://www.cftc.gov/LawRegulation/FederalRegister/finalrules/2017-11014.html.

[5] WORM records are not easily searchable and, as a result, even as noted in the Release, SEC and FINRA examiners typically do not request records in WORM format. Examiners instead request customized data pulls from the non-WORM systems where the information was originally created prior to its storage in WORM format.

situations, since the records are encrypted, and access to the records is restricted to each firm and its personnel.

Third-party retention relationships are required to be listed by broker-dealers in their SEC-filed Form BD, and a letter of undertaking seems redundant in terms of notifying the regulators of such a relationship. Accordingly, we recommend that this undertaking requirement should also be eliminated, along with the 90-day notification requirement (which is proposed to be eliminated), to provide for a broader use of cloud technologies with major third-party providers.[6]

II. "Senior Officer" Designation

Proposed Rules 17a-4(f)(3)(vii) and 18a-6(e)(3)(vii) contain a requirement that "at all times a senior officer of the member, broker or dealer who has independent access to and the ability to provide records maintained and preserved on the electronic recordkeeping system, file with the designated examining authority for the member, broker or dealer the following undertakings with respect to such records."[7]

Fidelity recommends that the proposed rules be modified to refer to "designated head or heads" instead of "senior officer." The term "senior officer" is used in other SEC regulations, and a reference in the proposed rules could prove to be confusing as regulated firms attempt to apply these terms when complying with these regulations.[8] In addition, we recommend that the proposed term be broadened to allow for more than one person to fulfill the requirement, thereby providing leeway to firms to account for personnel location changes, vacation scheduling, remote working and succession planning.

III. Preserving Ability for Firms to Use Distributed Ledger (Blockchain) Technologies

As the SEC is aware, distributed ledger/blockchain technologies are growing in importance and use. Apart from virtual currencies, blockchain technologies are emerging in commercial applications to help preserve and authenticate records and to store information. The use of blockchain technology will grow in the coming years as new and innovative uses of the blockchain are developed. We believe that such technologies may have promise in the area of recordkeeping and storage of information. To that end, we recommend that the Commission's proposal not preclude and instead support the adoption and use of new and innovative technologies in this area.

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[6] The undertaking requirement for senior officers in the Proposed Rule should be sufficient, since those individuals will have a regulatory obligation to provide records requested by the Commission.

[7] 86 Fed. Reg. No. 228, at 68326 (Dec. 2021).

[8] *See, e.g., Certification of Disclosure in Companies' Quarterly and Annual Reports,* Release Nos. 33-8124, 34-46427, IC-25722; File No. S7-21-02 (Aug. 2002), at https://www.sec.gov/rules/final/33-8124.htm.

The proposed rules should provide for sufficient flexibility should firms wish to introduce these technologies for recordkeeping purposes. As such, we recommend that the SEC include language in the adopting release that mentions blockchain technologies and provides an opening for firms to incorporate these technologies into their recordkeeping and auditing programs. This flexibility in use of technologies is the very purpose of these amendments, and we believe that the rules should reflect this approach.

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Fidelity appreciates the opportunity to provide comments on this important Rule Proposal, and we believe that our recommendations above would improve the SEC's recordkeeping requirements in the final rule.

Sincerely yours,

Alexander C. Gavis

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SVP & Deputy General Counsel

Cc: Chair Gary Gensler
Commissioner Hester M. Peirce
Commissioner Elad L. Roisman
Commissioner Allison Herren Lee
Commissioner Caroline A. Crenshaw
Mr. Michael Macchiaroli, Associate Director, Division of Trading and Markets
Mr. Thomas McGowan, Associate Director, Division of Trading and Markets