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VIA ELECTRONIC MAIL

January 3, 2022

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

Re: Electronic Recordkeeping Requirements for Broker-Dealers, Security-Based Swap Dealers, and Major Security-Based Swap Participants (File No. S7-19-21)

Dear Ms. Countryman:

The Financial Services Institute (“FSI”)¹ is submitting this comment letter in response to the U.S. Securities and Exchange Commission’s (“SEC”) proposed amendments (the “Proposed Rule”) to the electronic recordkeeping requirements for broker-dealers pursuant to Rule 17a-4 (“Rule 17a-4”) under the Securities Exchange Act of 1934, as amended (the “1934 Act”).² FSI appreciates the opportunity to comment on the Proposed Rule and is generally supportive of the proposed changes.

The Proposed Rule

Rule 17a-4 under the 1934 Act currently requires broker-dealers to, among other things, preserve electronic records exclusively in a non-rewriteable, non-erasable format, which is commonly referred to as “write once, read many” or “WORM” format.³ The Proposed Rule seeks to modify Rule 17a-4 by adding a second electronic recordkeeping option for broker-dealers, referred to as the “audit-trail alternative.”⁴ The “audit-trail alternative” would allow firms to preserve electronic records in a manner that permits the recreation of an original record if it is altered, over-written, or erased. If a firm utilizes the “audit-trail alternative,” its electronic recordkeeping system would be required to preserve a complete audit trail, which would need to include (1) all modifications to and deletions of a record; (2) the date and time of operator entries and actions that create, modify, or delete the record; (3) the individuals creating, modifying, or deleting a record; and (4) any other

¹ FSI is an advocacy association comprised of members from the independent financial services industry and is the only organization advocating solely on behalf of independent financial advisors and independent financial services firms. Since 2004, through advocacy, education, and public awareness, FSI has been working to create a healthier regulatory environment for these members so they can provide affordable, objective financial advice to hard-working Main Street Americans.

² Electronic Recordkeeping Requirements for Broker-Dealers, Security-Based Swap Dealers, and Major Security-Based Swap Participants, 86 FR 68300 (proposed Dec. 1, 2021) (to be codified at 17 C.F.R. pt. 240). The Proposed Rule, Release No. 34-93614, is also posted at <https://www.sec.gov/rules/proposed/2021/34-93614.pdf>.

³ See paragraph (f)(2)(ii)(A) of Rule 17a-4 under the 1934 Act.

⁴ See paragraph (f)(2)(i)(A) of Rule 17a-4, as proposed to be amended.

information needed to maintain an audit trail. Any broker-dealers adopting the “audit-trail alternative” would need to furnish any electronic records in a “reasonably usable electronic format” if those records are requested by the SEC.⁵ The SEC clarified that a “reasonably usable electronic format” would not include a firm’s proprietary electronic format that the SEC could not access or read using commonly available systems.⁶

In addition, and of interest to FSI members, the Proposed Rule would eliminate the designated third-party access and undertaking requirements (commonly referred to as the “D3P” undertaking) in paragraph (f)(3)(vii) of Rule 17a-4. The proposal would replace this D3P undertaking with a requirement that a “senior officer” of the broker-dealer, who has independent access to and the ability to provide the electronic records, execute an undertaking and provide access to the firm’s records upon a regulator’s request.⁷

The Proposed Rule would also, among other things, eliminate the notice and representation requirements from paragraph (f)(2)(i) of Rule 17a-4, which currently apply before a broker-dealer intends to employ electronic storage media to maintain any of its required records.⁸ This proposed change means that broker-dealers would no longer need to provide the SEC with a prior 90-days’ notice or furnish the WORM representations to the SEC, before using electronic records.

Background on FSI Members

FSI is an industry association comprised of members from the independent financial services industry, and is the only organization advocating solely on behalf of independent financial professionals and independent financial services firms. In the US, independent financial professionals account for a large percentage of all producing registered representatives. These financial professionals are self-employed independent contractors, rather than employees of independent broker-dealers (“IBDs”). FSI’s IBD member firms provide business support to independent financial professionals, in addition to supervising their business practices and arranging for the execution and clearing of customer transactions.

In addition, before commenting on the Proposed Rule, FSI urges the SEC to consider future rulemaking to address and modernize the broad “catch-all” requirement in Rule 17a-4(b)(4) under the 1934 Act for broker-dealers to maintain copies of all communications relating to their “business as such.” With offices closed due to the pandemic and the growth of remote working environments, broker-dealers have expanded use of virtual tools and interactive platforms for internal communications, including, for example, Slack, Zoom, and Microsoft Teams. These tools offer collaborative communication abilities, such as “chat” features, virtual white boarding sessions, and shared document editing, among others. Considering the accelerated pace of technological tools used to support remote work, as well as collaboration, it would be beneficial for the SEC to continue to modernize the books and records rules and to provide guidance on its views of how these more dynamic and interactive virtual communication systems should be viewed under Rule 17a-4(b)(4).

⁵ See paragraph (j) of Rule 17a-4, as proposed to be amended.

⁶ See Proposed Rule at p. 28.

⁷ See paragraph (f)(3)(vii) of Rule 17a-4, as proposed to be amended.

⁸ See Proposed Rule at p. 17-18.

Discussion

At the outset we note that our comments do not address the proposed changes applicable to security-based swap dealers or major security-based swap participants. This aspect of the proposal is removed from FSI members' core operations.

FSI supports the modernization of the electronic recordkeeping requirements and a shift to a more flexible approach, which would better align the rules with current technologies and broker-dealer practices. FSI appreciates that the Proposed Rule eliminates outdated and unnecessary requirements and offers broker-dealers greater flexibility in their storage of electronic records. The Proposed Rule's flexible approach supports innovation and enhances industry competition, which will result in better formats for electronic recordkeeping, and will reduce the excessive costs associated with the WORM storage requirements. The flexibility offered by the Proposed Rule also helps independent financial professionals support their clients' needs by allowing firms to maintain and preserve their client records in a more dynamic and less prescriptive electronic format.

Nonetheless, while generally supporting the direction of the Proposed Rule, FSI offers the following specific comments on the Proposed Rule with a view to enhancing or clarifying certain aspects of the Proposed Rule. In particular, FSI's primary substantive concern focuses on the prescriptive nature of the audit-trail alternative.

I. The SEC should consider a Principles-Based Approach in place of the Audit Trail Requirement

The SEC explains in its proposing release that it intentionally decided against proposing a "principles-based" electronic recordkeeping requirement, instead opting for a prescriptive audit-trail alternative.⁹ As described in more detail above, the audit-trail alternative would require specific information to be preserved by the firm's recordkeeping system, including all modifications and deletions of a record, the date and time of changes to records, the names of individuals changing the record, and any other information needed to maintain an accurate audit trail.¹⁰

In opting for a prescriptive audit-trail alternative, the SEC acknowledged that it considered the principles-based electronic recordkeeping requirements adopted by the Commodity Futures Trading Commission ("CFTC") in 2017.¹¹ Among other things, the principles-based approach adopted by CFTC required firms to retain records "in a form and manner that ensures the authenticity and reliability of such regulatory records."¹² The SEC also acknowledged in its proposing release that it considered a 2017 rulemaking petition submitted by FSI and certain other industry trade groups, which requested that the SEC replace the WORM requirement with a more flexible "principle-based requirement" similar to the one adopted by the CFTC.¹³

⁹ See Proposed Rule at p. 94.

¹⁰ See paragraph (f)(2)(i)(A) of Rule 17a-4, as proposed to be amended.

¹¹ See CFTC, *Recordkeeping*, 82 FR 24479 (May 30, 2017), available at: <https://www.cftc.gov/sites/default/files/idc/groups/public/@Irfederalregister/documents/file/2017-11014a.pdf>.

¹² *Id.*

¹³ See SEC Rulemaking Petition 4-713 (Nov. 14, 2017) filed by the Securities Industry Financial Markets Association, Financial Services Roundtable, Futures Industry Association, International Swaps Derivatives Association, and Financial Services Institute, available at: <https://www.sec.gov/rules/petitions/2017/petn4-713.pdf>.

Despite considering these principle-based approaches, including the one submitted by FSI in 2017, the SEC's proposal still prescribes specific recordkeeping requirements, as well as specific information that must be collected by firms that elect the audit-trail alternative. The audit-trail alternative proposed by the SEC is not "technology-neutral" and mandates specific technology requirements and electronic formats for broker-dealers, which reduce the ability for firms to implement future technological innovations or advancements. FSI requests that the SEC reconsider its decision not to adopt a principles-based approach to electronic recordkeeping, as it would allow firms greater flexibility to implement systems tailored to their individual business activities and technological specifications, without sacrificing the SEC's goal of preserving "the security and authenticity of and access to records."¹⁴

II. The SEC should provide Additional Clarification concerning the Transition Period to the New Proposed Rule

The Proposed Rule does not provide much detail regarding how firms would transition away from their current WORM recordkeeping systems. In addition, the SEC does not clarify how broker-dealers should transition away from the requirements that were eliminated by the Proposed Rule, namely the required D3P undertaking in paragraph (f)(3)(vii) of Rule 17a-4, and the notice and WORM representation requirements in paragraph (f)(2)(i) of Rule 17a-4.

For instance, terminating a third-party relationship with a WORM recordkeeping provider may result in challenges for broker-dealers attempting to "cut-off" access for the WORM provider, and transition its existing records from the WORM provider to a new service provider that complies with the audit-trail alternative. The Proposed Rule is also not clear whether a broker-dealer would need to rescind or withdraw its prior undertakings, notices, or WORM representations filed pursuant to Rule 17a-4, or whether a broker-dealer would need to notify the SEC before transitioning to another compliant alternative. FSI requests guidance and clarification from the SEC related to these items.

III. The Undertaking Outlined in 17a-4(i) should be Eliminated or Modified

Although the SEC eliminated the D3P undertaking in paragraph (f) of Rule 17a-4, the Proposed Rule did not amend the outside service provider undertaking in paragraph (i). This undertaking is generally designed to ensure the accessibility of broker-dealer records in situations where a third-party service provider refuses to transfer records to the broker-dealer due to nonpayment of fees. The SEC should consider relaxing this requirement. We note that many small and mid-sized firms struggle to find outside recordkeeping vendors willing to provide such an undertaking. For instance, many cloud service providers, such as Microsoft and Amazon, do not have the ability to make the undertaking in Rule 17a-4(i), as these files are typically encrypted and only accessible by the broker-dealer firm using the cloud storage services. Given the inability for cloud providers to make (or, in some cases, their refusal to assume liability for making) the undertaking required by Rule 17a-4(i), the SEC should consider relaxing or eliminating this undertaking entirely.

¹⁴ See Proposed Rule at p. 70.

IV. Requested Clarification on the Application of Existing SEC Guidance and Interpretations

The SEC has issued various forms of guidance and interpretations addressing broker-dealer electronic recordkeeping requirements since Rule 17a-4(f) was adopted in 1997, including interpretations in 2001,¹⁵ 2003,¹⁶ and 2019.¹⁷ Although the SEC clarified that its 2003 interpretation was still “extant,” FSI requests additional guidance regarding how this interpretation, as well as the other interpretations mentioned above, would be impacted by or read in conjunction with the proposed amendments.¹⁸

Conclusion

FSI is committed to constructive engagement in the regulatory process and welcomes the opportunity to work with the SEC on this and other regulatory efforts. Thank you for considering FSI’s comments. Should you have any questions, please contact me at [REDACTED].

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Bellaire". The signature is fluid and cursive, with a large initial "D" and "B".

Dave T. Bellaire, Esq.
Executive Vice President & General Counsel

¹⁵ See *SEC Interpretation: Commission Guidance to Broker-Dealers on the Use of Electronic Storage Media under the Electronic Signatures in Global and National Commerce Act of 2000 with Respect to Rule 17a-4(f)*, Exchange Act Release No. 44238 (May 1, 2001), available at <https://www.sec.gov/rules/interp/34-44238.htm>.

¹⁶ See *Electronic Storage of Broker-Dealer Records*, Exchange Act Release No. 47806 (May 7, 2003), available at <https://www.sec.gov/rules/interp/34-47806.htm>.

¹⁷ See *Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers*, Exchange Act Release No. 87005 (Sept. 19, 2019), available at <https://www.sec.gov/rules/final/2019/34-87005.pdf>.

¹⁸ See Proposed Rule at p. 26.