



October 11, 2011

VIA ELECTRONIC MAIL (rule-comments@sec.gov)

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: File No. S7-36-11; Retrospective Review of Existing Regulations

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to comment on the referenced release, through which the Securities and Exchange Commission (“SEC”) seeks comment on the development of a plan for the retrospective review of the SEC’s regulations.² The SEC has sought comment on its rule review process in response to Executive Order 13579, “Regulation and Independent Regulatory Agencies,” which states that, to facilitate the review of existing significant regulations, such agencies “should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.”³

¹ The Securities Industry and Financial Markets Association (“SIFMA”) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA’s mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (“GFMA”). For more information, visit www.sifma.org.

² Release Nos. 33-9257; 34-65262; 39-2479; IA-3271; IC-29781; File No. S7-36-11 (September 6, 2011); 76 FR 56128 (September 12, 2011) (“Release”).

³ Release at 56129; *citing* Memorandum for the Heads of Independent Regulatory Agencies, M-11-28, “Executive Order 13579, “Regulation and Independent Regulatory Agencies” (July 22, 2011). We understand that, under the Executive Order, the independent agencies are asked to develop and release to the public their respective rule review plans by November 9, 2011.

SIFMA believes that Executive Order 13579 presents an opportunity to focus on an important set of issues that often goes overlooked – strengthening and increasing transparency into the SEC’s retrospective review process for the rules, regulations and other standards that it administers directly and through the rules of the various securities self-regulatory organizations (“SROs”).

I. Process and Standards

As a threshold matter, SIFMA believes that the SEC should periodically review *all* of its significant rules and regulations (not just those rules finalized in the last ten years) and that those rules that impose a relatively high cost on market participants and investors should be *prioritized* and reviewed with a frequency that is directly based on the costs and impact of the rule or regulation.⁴ Indeed, SIFMA believes that rigorous cost-benefit analysis is a critical component of the rulemaking process for all administrative agencies.

As part of the review process, on an annual basis, each rulemaking division or applicable office of the SEC should identify those rules to be reviewed for the upcoming year and the SEC should seek comments from the public as to whether the rules identified, or other rules, should be on the “priority list” of rules for review. In identifying such rules in the first instance, the responsible SEC staff should consider technology changes in the securities industry, significant market events, broader societal trends (*e.g.*, the prevalence of social media), and data from other SEC offices and divisions, including the Office of Risk, Strategy, and Financial Innovation. The Staff also should review significant no-action letters that have been issued over the previous 12 months, as well as litigation and enforcement cases that have been decided or settled during this same period, for purposes of developing the priority list.

Once the SEC has determined which rules and regulations will be reviewed for the upcoming year, it should publish the list of such rules and regulations, the stated rationale for selecting such rules, and the schedule for review. Then, in connection with its substantive review of each rule, the SEC should separately seek comment on the specific rules, including economic data on the costs and benefits of the rules. The SEC could also consider hosting public roundtables on the rules in connection with its reviews.

In conducting its review of each rule, the SEC should identify the issue that the existing rule or regulation was designed to address at the time it was adopted. It should then determine whether such issue continues to be relevant and significant. If it determines the issue is relevant and significant today, it should assess whether the existing regulation addresses the continuing issue in a manner that is effective and efficient. Similar to how

⁴ To identify those “higher cost” rules, the SEC could review the cost-benefit analyses that were performed in connection with the original promulgation of its rules.

the SEC will issue an adopting release for a final agency rule, SIFMA believes the SEC should issue a release at the conclusion of its review of each rule that responds to the comments filed and explains why it chose to maintain the existing rule as written, modify the rule, or delay a final decision, pending further analysis or review.⁵ We also believe that, when the SEC promulgates a new rule, it should set forth in the adopting release a specific timeframe for the retrospective review contemplated herein.

Finally, in order to enhance the transparency of the review process, SIFMA believes it would be very helpful for the SEC to develop a webpage that sets out the current status of each of the rule review projects underway at any given time. We note that FINRA makes available on its website a tool to track the status of rule filings submitted to the SEC for approval (or immediate effectiveness)⁶ and the SEC could develop a similar tool for tracking the status of its rules identified for review. In addition to a rule review status page, we believe the SEC should make available through its website the ability for users to submit written comments on *any* existing rule, regulation, or other SEC release, interpretation, “no-action” position or exemption issued by the SEC or its staff (and not just those formal rules proposed to be adopted or amended or those identified for review under this retrospective rule review process).

II. Scope

In addition to formal SEC rules and regulations, SIFMA believes that any other “standard setting” release, interpretation, “no-action” position or exemption issued by the SEC or its staff must be in scope for the retrospective review. For example, in the context of online securities offerings, the conditions of the no-action letter issued to Wit Capital in 1999⁷ effectively have become the standard ground rules for conducting online offerings and the Staff treats them as if they are formal rules. This is but one example of the many SEC and SEC staff pronouncements that have nearly the same impact on industry participants and operations as formal agency rules⁸ and to exclude them from review merely because they

⁵ With regard to trading rules, in particular, we believe that the SEC should conduct more thorough studies *before* proposing a trading or market structure rule and should conduct studies regarding the impact of the rule *after* it is implemented to determine if the rule is working as intended, has any unintended consequences, or otherwise harms the market.

⁶ FINRA’s Rule Filing Status Report is available through the following link: http://apps.finra.org/Rules_and_Regulations/rulefilings/1/default.aspx

⁷ *See Wit Capital Corporation*, SEC No-Action Letter, 1999 SEC No-Act. LEXIS 620 (July 14, 1999).

⁸ There are many other examples of such “standard setting” regulatory pronouncements by the SEC or its staff. Such examples include, but are not limited to: the SEC’s interpretive guidance on the use of electronic media (*see* Securities Act Release Nos. 7856 (Apr. 28, 2000); 7288 (May 9, 1996); and 7233 (Oct. 6, 1995)); the so-called “nine firms” no-action letter issued in the context of SEC Rule 15a-6 (*see* Cleary, Gottlieb, Steen & Hamilton, SEC No-Action Letter (Apr. 9, 1997)); and the 1994 “prime brokerage letter” (*see* SIA, SEC No-Action Letter (January 25, 1994)).

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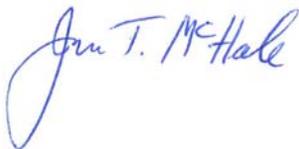
are not formal rules or regulations would be a mistake and would make for an incomplete review.

Moreover, in light of the broad and substantial impact of many SRO rules, staff interpretations and other “pronouncements,” we believe a similar review process should be employed for the rules and other written pronouncements of the various SROs. Much like SEC staff guidance, SRO member notices, FAQs and the like can have the practical impact of formal rules that were approved by the SEC, and, therefore, should be subject to some type of retrospective review process. It also would be helpful to formalize a collaboration process between the SEC and the SROs regarding rule review and prioritization. Many of the SROs’ rules are complementary to the SEC’s rules (*e.g.*, rules regarding books and records), which makes such coordination all the more important.

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SIFMA appreciates the opportunity to provide comments on the SEC’s retrospective rule review plan. We would be pleased to discuss the SEC’s plan and our comments in greater detail with the SEC and its staff. If you have any comments or questions, please do not hesitate to contact me at (202) 962-7386 or jmchale@sifma.org.

Very truly yours,



James T. McHale
Managing Director and Associate General Counsel