



Invested in America

December 15, 2011

Via Electronic Mail (pubcom@finra.org)

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 11-48: Books & Records – Proposed Rule 4516

Dear Ms. Asquith:

SIFMA¹ appreciates the opportunity to comment on FINRA Regulatory Notice 11-48 proposing Rule 4516 (“Proposal”). The Proposal would require clearing and carrying firms to maintain and keep current delineated records in a central location to facilitate the rapid and orderly transfer of customer accounts in the event of liquidation or another event necessitating account transfer. In the Proposal, FINRA states that “The inability to locate certain documents and information was identified as a concern in connection with the Lehman Brothers Inc. liquidation during the recent credit crisis.”² SIFMA is fully supportive of FINRA’s goals to adopt rules that enhance investor protection and reduce risks that arise upon the occurrence of extraordinary market and industry events when such rules are deemed necessary. In fact, SIFMA has historically worked and continues to work with FINRA, the Securities and Exchange Commission (“SEC”) and other regulatory agencies to develop rules and best practices for the securities industry that meet our shared goal of investor protection. Where this cooperation between SIFMA and the regulatory community has been extremely beneficial is in the adoption of rules and best practices that are effective in protecting investors but that don’t impose undue burdens on the industry and significant costs that can increase the ultimate costs borne by investors. Although SIFMA understands the laudable purpose of the Proposal, SIFMA does not believe the requirements of proposed Rule 4516 are the most effective and efficient means to address these concerns.

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 develop policies and practices which strengthen financial markets and which encourage capital availability, job creation and economic growth while building trust and confidence in the financial industry. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

² FINRA Regulatory Notice 11-48, at fn 3.

SIFMA believes investors, regulators, and the industry would all benefit by a reconsideration of the current Proposal and further dialogue between FINRA and the industry to determine which elements of the rule requirements are truly necessary in light of the extensive existing regulation governing recordkeeping and retrieval of records, as well as significant forthcoming regulations from other financial regulators in this area. In addition, taking additional time to consider the Proposal will allow FINRA to work with the industry to better understand and clarify what books and records would be required to transfer customer accounts and how access to relevant systems and information can be gained.

SIFMA highlights below certain aspects of the proposed rule which could be interpreted differently given the breadth of how some of requirements were drafted. This lack of certainty requires clarification or additional levels of specificity and detail in order to determine whether such requirements are appropriate in achieving FINRA's and the industry's goals of investor protection. SIFMA welcomes the opportunity to have a detailed discussion with FINRA regarding what books and records FINRA is specifically seeking, and determine how best to achieve the goals of the Proposal.

A. Additional Analysis Needed

Member firms already maintain the records covered by proposed Rule 4516, pursuant to existing FINRA, SEC, and other financial regulators' rules. The existing rules require prompt production of documents, records, or information to regulators. Moreover, financial regulators are currently undertaking extensive rulemaking governing recordkeeping which may impact the records that would be required to be maintained pursuant to the Proposal. As such, SIFMA requests that FINRA delay this rulemaking until the other financial regulators complete related rulemakings, so as to ensure efficient and proper recordkeeping practices across the industry. SIFMA also requests that FINRA undergo an appropriate cost-benefit analysis prior to adopting a rule such as the Proposal that imposes requirements that potentially require firms to create new systems in order to access the retained documents, establish credentials for authorized persons to access those documents, and maintain adequate security procedures to protect these documents. Without a doubt, both investors and the industry benefit from accurate and accessible records but SIFMA believes there are potentially other methods of reaching the same goals more efficiently and effectively.

1. Delay Pending Other Regulatory Initiatives

SIFMA encourages FINRA to delay adopting a new recordkeeping rule such as this in light of several new financial regulatory initiatives already underway, mostly pursuant to Dodd-Frank. SIFMA encourages FINRA to coordinate among the SEC, SIPC, and banking regulators that are required under the Dodd-Frank Act to develop rules governing "living wills" and other similar rules to ensure rapid and orderly transition of business in the event of a firm's material financial distress.³ In addition, the Commodity Futures Trading Commission ("CFTC") has several pending rule proposals that directly impact firm

³ See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act Section 205.

recordkeeping requirements which should also be taken into consideration.⁴ Many, but not all, large SIFMA members, or their affiliates, will be subject to these requirements and, thus, would be potentially subjected to separate recordkeeping obligations or procedures for maintaining the same information. Delaying the adoption of this Proposal and coordinating efforts between regulators will ensure that the recordkeeping requirements are implemented consistently across the industry.

2. Exploration of Alternatives

SIFMA requests that FINRA take additional time to meet with member firms, clearing agencies, and other market participants affected by the Proposal prior to adopting proposed Rule 4516. All market participants would benefit from a more fulsome discussion of the goals of the Proposal and an exchange of ideas on how best to meet those goals in an efficient manner. SIFMA believes there are alternative approaches to achieve the laudable objectives of the Proposal, and would be happy to meet with FINRA and provide information and data necessary to assist FINRA in any way we can.

3. Existing Regulations are Extensive

Member firms are currently subject to rigorous recordkeeping requirements under Rules 17a-3 and 17a-4 of the Securities Exchange Act of 1934 (“Exchange Act”) as well as FINRA’s own Books and Records rule which became effective on December 5, 2011.⁵ Creating a new retrieval system or mechanism for these same books and records to meet the “central location” requirement in proposed Rule 4516 may not be necessary given these existing requirements.

Firms must currently keep records required under the Exchange Act in an easily accessible place pursuant to Rule 17a-4 and produce documents stored electronically to regulators “promptly” pursuant to Rule 17a-4(f). Proposed Rule 4516(c) introduces a new higher standard of production which may have little practical effect.

Further, we note that under Exchange Act Rule 17a-4(f)(3)(vii) member firms must engage at least one designated third party to have access and the ability to download firm records stored electronically and to provide such records to the SEC, FINRA, or other regulators. This third party must formally represent in an undertaking to FINRA that it will provide required records in an acceptable medium. This rule was specifically intended to address

⁴ See, e.g., *Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap*, 75 Fed. Reg. 76666 (Dec. 9, 2010) (amending 17 CFR §23.203(a)) (requiring swap dealer or major swap participant to keep records at the principal place of business and maintain a listing by title of persons who can explain type and content of records); *Regulations Establishing and Governing the Duties of Swap Dealers and Major Swap Participants*, 75 Fed. Reg. 71397 (Nov. 23, 2010) (amending 17 CFR §23.603) (record keeping for business continuity plans); *Adaption of regulations to incorporate swaps*, 76 Fed. Reg. 33066 (July 7, 2011) (amending 17 CFR 1.31) (additional requirements for the keeping and inspection of books and records).

⁵ FINRA Regulatory Notice 11-19 (April 2011).

many of the same concerns expressed in the Proposal including ensuring the orderly provision of records when a firm is no longer operational. At a minimum, SIFMA suggests the Proposal be amended such that documents stored pursuant to the requirements of Rule 17a-4(f)(3)(vii), and therefore subject to the third party downloader requirement, should be expressly excluded from proposed Rule 4516.⁶

SIFMA believes, however, that there may be additional approaches which could be taken pursuant to the existing regulatory structure which would significantly improve the accessibility of those records by regulators. Such improvements could take a variety of forms but would still achieve the same goals of the Proposal.

4. Cost-Benefit Analysis

SIFMA believes that, prior to submitting any proposed rule to the SEC for approval, FINRA should conduct an appropriate cost-benefit analysis in light of the comments contained herein and other comments FINRA has received. This analysis would be required for any new SEC books and records rule, and it should not be overlooked simply because the alternative path of a self-regulatory rule was chosen. If a firm goes bankrupt, there clearly is a need to transfer customer accounts as quickly as possible. However, to meet the standard for approval under Sections 15A(b) and 19(b) of the Exchange Act, FINRA should demonstrate the benefits of the proposed books and records requirements in light of the aggregate costs. This may be accomplished by conducting an analysis of the efficiency and effectiveness of this Proposal in light of the substantial effort clearing and carrying firms will undergo to implement the requirements and maintain compliance with the Proposal. Investors will ultimately bear some of the costs of implementing any substantial change such as this, so it is important to ensure this is the most effective method of addressing the rule's articulated purpose, taking into account the wide variety of firms that would be subject to this rule and in light of other potential approaches to achieving the goals of the proposal.

SIFMA would be happy to review the list of documents required to be retained under the Proposal with FINRA, assist in any cost-benefit analysis, and work with FINRA to identify those documents and items of information for which the goal of investor protection in connection with books and records could not be met through any other means than the centralized retention of such documents and information.

B. Specific Comments

In addition to our general concerns about the Proposal, SIFMA has some concerns about the proposed rule as currently drafted.

1. Clarification of “Carrying or Clearing Member” (Proposed Rule 4516(a))

Proposed Rule 4516(a) requires “each carrying or clearing member” to maintain and keep current certain records in its principal office. Records maintained electronically must be

⁶ Exchange Act Release No. 64676 (June 15, 2011).

“uniquely tagged and appropriately indexed” so they can be readily identified and accessible to regulators.

SIFMA notes that FINRA rules do not currently include a clear definition of “carrying or clearing member” although this term is used frequently throughout the FINRA rules, including in this Proposal. SIFMA recommends amending the Proposal to reflect a clear definition of “carrying and clearing member” to mean “broker-dealers that maintain custody of customer funds or securities, or clear customer transactions pursuant to the exemptions under SEA Rule 15c3-3(k)(2)(i).” Such a definition would be consistent with FINRA Rule 4523 and the SEC’s recently proposed amendments to Exchange Act Rule 17a-5 governing Broker-Dealer Reports.⁷

2. Readily Identifiable and Accessible Records (Proposed Rule 4516(a))

Section (a) requires firms to keep records “current” in a specially designated location within the principal office or, in the case of electronic records, the records must be “uniquely tagged and appropriately indexed” and accessible from the member’s principal office. SIFMA acknowledges and understands the purpose behind these requirements but given the diversity in recordkeeping methodologies among firms, firms will likely take a wide variety of approaches to comply with the Proposal. As such, we would like to gain additional understanding of FINRA’s objectives for these requirements and discuss with FINRA alternative means of achieving these goals.

First, it would be particularly helpful for FINRA to provide additional guidance for member firms on how often firms would be required to update their records in order to “keep current” under proposed Rule 4516(b). SIFMA is concerned that this standard could override other requirements imposed on firms by the underlying regulatory requirements in SEC or FINRA rules. SIFMA recommends a standard that would permit firms to reasonably determine the frequency with which such records are updated based on the nature and the facts and circumstances of the types of information involved.

In addition, it is unclear whether the “uniquely tagged” requirement in this section is intended to have a specific technical meaning, or speaks generally to records accessibility and retrieval. We note that existing records submission processes have more specific tagging requirements, such as those required by FINRA’s XML program. SIFMA believes that FINRA should either elaborate on the tagging requirement sought here, or eliminate it in favor of the existing accessibility requirements of SEC and FINRA recordkeeping rules.

Finally, SIFMA also questions the need to retain such records at a firm’s principal office. SIFMA recommends providing firms with the opportunity to retain records at alternate locations so long as firms maintain documentation of where such records are kept in the case of paper records, and accessible to regulators in the case of electronic records.

⁷ Exchange Act Release No. 64676 (June 15, 2011).

3. Recordkeeping Requirements (Proposed Rule 4516(b))

SIFMA notes that the descriptions of the documents required to be maintained pursuant to proposed Rule 4516(b) are generally not specific enough for firms to properly delineate the documents that meet the requirements of proposed Rule 4516. Generally, SIFMA recommends that each subsection cross-reference the corresponding SEC or FINRA rule in which the record was originally required to be maintained. Member firms would then have a more specific road map to determine which records FINRA is looking to access pursuant to this Proposal. Our other specific comments related to each item are detailed below.

a. General Ledger (Proposed Rule 4516(b)(1))

Proposed Rule 4516(b)(1) requires firms to maintain a “description of all accounts and ranges on the general ledger.” SIFMA suggests clarifying subsection (b)(1) to encompass only those accounts subject to FINRA Rule 4523 and broadening the requirement such that it reads “a description of all account types, ranges, or categories” which more accurately depicts the current recordkeeping requirements and practices of member firms. SIFMA also recommends providing more information on what is meant by “ranges” for the purposes of the Proposal.

b. “Affiliated Accounts” (Proposed Rule 4516(b)(2))

SIFMA requests additional clarification on what is meant by “affiliated accounts” which firms would be required to maintain as part of the mapping of general ledger accounts and ranges to the trial balance in proposed Rule 4516(b)(2). SIFMA believes the term “affiliated accounts” could be construed in a variety of ways. SIFMA requests that FINRA confirm that it intends this term to mean related accounts held at the firm. SIFMA is concerned that this term could be interpreted to include accounts held by a member firm’s affiliates including those not within FINRA’s jurisdiction such as non-broker-dealers and foreign institutions.

c. Mission Critical Systems and Business Continuity Plans (Proposed Rule 4516(b)(3) and (10))

SIFMA recommends combining the requirements in proposed Rule 4516(b)(3) and (10) because both reference Business Continuity Plans directly or indirectly, and thus are closely interrelated. In addition, FINRA Rule 4370 already requires members to maintain a list of mission critical systems and name appropriate contact persons within the firm as part of a Business Continuity Plan (“BCP”). SIFMA recommends that FINRA use these same BCP contact persons for the purposes of the Proposal because such individuals would generally be able to provide the information relevant to the purposes of the Proposal.

d. Bank Accounts (Proposed Rule 4516(b)(4))

Proposed Rule 4516(b)(4) requires firms to maintain a list of bank accounts, authorized signatories, copies of executed agreements, and “no lien” letters. SIFMA requests that FINRA clarify what is meant by “bank accounts,” by cross-referencing the definition of “bank” in Section 3(a) of the Exchange Act.

e. Stock Record (Proposed Rule 4516(b)(5))

The requirement to indentify all accounts and ranges on the stock record under proposed Rule 4516(b)(5) will be difficult for firms to comply with because the stock record is a live feed which is updated constantly. To minimize the burden but also maintain the intent of the Proposal, SIFMA recommends that FINRA limit this subsection to ranges and exclude “all accounts.” Such information is readily available within firms.

f. Foreign and Domestic Control Locations (Proposed Rule 4516(b)(6))

Proposed Rule 4516(b)(6) requires member firms to identify all foreign and domestic control locations pursuant to Exchange Act Rule 15c3-3 with the names of contact persons at each of those institutions. Large member firms could have hundreds of contact persons at control locations, thus making any list outdated almost as soon as it is created. SIFMA requests that the information required to be retained pursuant to this section should be limited to the existing recordkeeping requirements for foreign and domestic control locations – name, address and principal place of business and, for foreign entities, the name and address of the governmental agency or other regulatory authority which supervises the entity.⁸

There are reasons why certain clearing and carrying firms are allowed to elect to operate under the SEC Rule 15c3-3(k)(2)(i) exemption. All of their transactions are required to be conducted on a DVP/RVP basis. Often, the actual mechanics of clearing and settlement operations are handled by a much larger affiliate, frequently located in a foreign country. Under FINRA rules, the U.S. broker-dealer member firm remains responsible for the clearance of transactions. Yet there is minimal risk to customer funds and securities, or, more importantly, systemically, because securities are only delivered against payment by the customer. FINRA lacks authority to mandate how foreign clearing firms maintain their books and records. Compliance with the proposed rule may be particularly burdensome to a member firm clearing through a foreign affiliate if FINRA’s requirements violate the laws of where that clearing affiliate is located. FINRA is setting up a potential conflict between U.S. and non-U.S. law.

In addition, SIFMA requests clarification on how and if alternative investment vehicles would be covered by (b)(6).

g. Subordination Agreements (Proposed Rule 4516(b)(7))

SIFMA requests that FINRA clarify that “subordination agreements” and “nonconforming subordination agreements” are intended to have the same definition as found in Exchange Act Rule 15c3-1. If so, we note that these agreements are already required to be filed with the firm’s self-regulatory organization, and therefore should be readily accessible to FINRA and other regulators at any time. As a result there would be no additional benefit in creating

⁸ Exchange Act Release No. 10429 (Oct. 12, 1973).

a new requirement to retain these documents in such a way so as to make them “immediately accessible.” Also, FINRA should clarify whether it is referring to subordination agreements received from other broker-dealers, offered to other broker-dealers, or both.

h. Outsourcing Agreements (Proposed Rule 4516(b)(9))

Subsection (b)(9) requires firms to have available copies of “executed agreements relating to the outsourcing of any significant activities or functions that are critical to the transfer of customer accounts and the liquidation of the member.” FINRA should provide additional detail regarding what types of agreements could fall within this definition. Moreover, FINRA issued a concept release regarding proposed Rule 3190 last spring⁹ governing relationships between clearing and carrying firms and third party service providers. If FINRA finalizes such a rule at any point in the future, SIFMA recommends that those rules align with the recordkeeping requirements in proposed Rule 4516.

4. Availability and Accessibility (Proposed Rule 4516(c))

Section (c) of proposed Rule 4516 would require firms to make the delineated records “immediately available and accessible” to FINRA, SEC, and SIPC representatives. SIFMA requests additional clarification on the timeframe for providing this information pursuant to Rule 4516(c). Further, we note that the member firm at issue would have to provide access credentials to any regulator representative prior to granting access to the documents. Providing such access on short notice may take some time to complete due to the firms’ required security procedures.

5. Access via Clearing Agency, Clearing Banks, or Custodians (Proposed Rule 4516(d))

As proposed, the Rule does not include a time frame for which the clearing agency, clearing bank, or custodian would be required to provide such access. A reasonable time frame is a necessity so that the members and the clearing agency, clearing bank, or custodian knows what is expected and can provide the necessary access method.

In addition, in cases where existing electronic systems do not currently have the capability of creating “read only” methods of access, a new level of “read only” access could require significantly altering existing systems, which may be time-consuming and expensive. If a “read only” access is strictly required, rather than some other method of access that provides equivalent access to information, the Rule would need to allow some time for the clearing agency, clearing bank, or custodian to implement and test the technical capability and for the member to verify that it will be provided.

Finally, the proposed rule requires member firms to “enter into an agreement” with every clearing agency, clearing bank, or custodian, regardless of whether such a third party is a member or is otherwise subject to regulations that require the third party to provide similar access to the electronic records. It is important to note that some members may have

⁹ FINRA Regulatory Notice 11-14 (March 2011).

hundreds of such arrangements, thus renegotiating such agreements would be highly inefficient. We note, in addition, that FINRA has not addressed how to provide such access for records properly located in a non-U.S. jurisdiction.

We request that FINRA provide some flexibility to allow member firms to use means other than a contractual arrangement to verify that such access would be provided in the event of a commencement of liquidation.

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Thank you for the opportunity to provide comments on the Proposal. Please call me at 202-962-7385 to discuss the appropriate next steps and any questions you may have.

Respectfully submitted,

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Managing Director & Associate General Counsel

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