



February 4, 2005

R. Corey Booth
Director/Chief Information Officer
Office of Information Technology
U.S. Securities & Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: SEC Request for Comment on Proposed Collection of Information
pursuant to Paperwork Reduction Act of 1995

Dear Mr. Booth,

SIA appreciates the opportunity to respond to the Commission's Notice soliciting comments on the collection of information pursuant to SEC recordkeeping rules (Rules 17a-3 and 17a-4). We understand that the Commission will be submitting the collection of information to the Office of Management and Budget for extension and approval, and that the SEC must certify compliance with 5 CFR 1320.9 and the related provisions of 5 CFR 1320.8(b)(3). The Notice requests written comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Our comments are focused on two aspects of the collection of information:

- Rule 17a-4(b)(4), which requires every broker and dealer to preserve for not less than three years "originals of all communications received and copies of all communications sent . . . by the member, broker or dealer (including inter-office memoranda and communications) relating to its business as such." This is known as the "Business as Such Rule."
- Rule 17a-4(f), which enables brokers or dealers to store records in "electronic storage media" only if certain conditions are met, including the use of a particular form of technology known as "write once, read many." This is known as the "WORM Rule."

The SEC should review and update its annual reporting and estimate of the annual hourly recordkeeping burden and total annual cost estimates for the Business as Such and WORM rules.

An agency is required to demonstrate to OMB “that the collection of information is the least burdensome way of obtaining information necessary for the proper performance of its function, that the collection is not duplicative of others, and that the collection has practical utility.” Additionally, an agency is required to certify that a collection of information “reduces to the extent practicable and appropriate the burden on respondents.” Over the last three years the SEC has expanded its interpretation of the scope of the Business as Such Rule to include virtually all internally and externally sent email communications and instant messaging communications. This expansive interpretation became clear through informal statements and enforcement actions rather than through a formal rulemaking.

At the same time, in May 2001 the SEC reaffirmed that the standard mandated by the WORM Rule is the only method by which brokers and dealers may retain records – including millions and millions of emails - electronically despite the technology neutrality standards for record storage under the Electronic Signatures in Global and National Commerce Act of 2000. Given these developments, it is not clear whether the SEC has updated for OMB review its annual burden estimate for Rule 17a-4 of 254 hours per broker-dealer per year and cost estimates (including capital, start-up, operating, and maintenance costs). SIA believes that the burdens and costs of this collection of this information are vastly underestimated. These burdens and costs could be significantly reduced, and the quality of the information collected materially enhanced, by eliminating restrictions on the use of electronic storage media, as indicated below.

The SEC should clarify the recordkeeping rules relating to email retention in order to minimize the burdens of recordkeeping.

Under the Paperwork Reduction Act, an agency is required to use “plain, coherent, and unambiguous language that is understandable to respondents.” While most of the SEC’s books and records rules identify specific documents that must be kept, the standard for the Business as Such rule is vague and subject to varying interpretations, especially as relates to email communications. The applicable SEC rule (enacted in 1939 in the context of record keeping rules) states that communications are subject to retention if they relate to the firm’s “business as such.” This highly subjective standard does not lend itself to a hard and fast compliance solution since each communication would theoretically have to be reviewed to determine if it relates to the firm’s “business as such” before being archived. Moreover, the lack of SEC guidance exposes firms to unnecessary regulatory risk since a broker-dealer’s good faith attempt to define “business as such” in its retention policy could be found to be lacking by enforcement staff with a different interpretation.

The SEC should eliminate restrictions on the use of electronic storage media in order to improve the quality of information collected.

Under the Paperwork Reduction Act, an agency must assure that its collection of information burdens “make appropriate use of information technology to reduce burden.” SIA member firms believe that storage solutions that meet the technical requirements of the current SEC rule are woefully inadequate for storing the volume of electronic documents, particularly email, that the SEC requires to be retained today. Moreover, firms are exposed to greater regulatory and litigation risks as a result of having to maintain discoverable data on systems that are inefficient for purposes of search and retrieval. Finally, the SEC rule requirements for storage are significantly more expansive than those established under ESIGN. Other federal agencies, such as banking regulators and the Defense Department that have an equally strong interest in document integrity, have not imposed similar storage rules on their constituents. The specific problems identified with the storage technology mandated by the SEC are explained in greater detail in the [attached letter](http://www.sia.com/2003_comment_letters/pdf/SEC2-21-03.pdf) (http://www.sia.com/2003_comment_letters/pdf/SEC2-21-03.pdf), which SIA sent to the SEC in February, 2003. The subsequent interpretive guidance issued by the SEC in May, 2003, was widely viewed as reaffirming existing SEC policy. As a result, broker-dealers still lack the flexibility to select electronic storage technologies that would permit them to efficiently save, archive and retrieve the documents that regulators require.

SIA would welcome the opportunity to continue what has been a constructive dialogue with the SEC on the issues of record retention and storage. If you have any questions or comments regarding the opinions expressed in this letter, please contact Scott Kursman, SIA Vice President and Associate General Counsel, at 212-618-0508.

Very truly yours,

Scott C. Kursman
Vice President
& Associate General Counsel

Attachment

Cc: John D. Graham, Administrator, Office of Information and Regulatory Affairs,
Office of Management and Budget