



Securities Industry Association

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July 26, 1996

Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549

Re: "Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information" (File S7-13-96)

Dear Mr. Katz:

The Technology Regulatory Subcommittee and Federal Regulation Committee (the "Committees")¹ of the Securities Industry Association ("SIA")² appreciate the opportunity to provide comments to the Securities and Exchange Commission (the "Commission" or "SEC") regarding the above-referenced release (the "Release").³ The Release provides guidance on the use of electronic media by broker-dealers, transfer agents and investment advisers to deliver information required under the Securities Exchange Act of 1934 (the "Exchange Act") and the Investment Advisers Act of 1940 (the "Advisers Act").

I. INTRODUCTION AND BACKGROUND

The Release supplements an earlier SEC interpretive release published in October 1995 (the "1995 Release") in connection with the use of electronic media for the delivery of information required under the Securities Act of 1933, the Exchange Act and the Investment Company Act of 1940, including prospectuses, annual reports and proxy solicitation materials.⁴ SIA submitted a comment letter regarding the 1995 Release,⁵ and sent a letter to Commissioner Steven M.H. Wallman in anticipation of the Release (the "1996 SIA Letter").⁶

SIA is convinced that the impact of the Internet and related technologies on the securities industry will be extraordinary. We firmly believe that the use and development of this new technology must be encouraged because of the benefits it offers to investors, the industry, regulators and securities markets generally.

These new electronic media offer the potential to deliver information to investors in a

better, faster and more convenient manner than traditional paper-based methods of delivery. They provide the ability to make securities transactions more convenient, cost effective and efficient for customers. Historically, technological advances have provided the tools to securities firms⁷ to conduct securities transactions more efficiently and with less risk, to enhance firms' compliance, surveillance and risk management functions and to satisfy customer demand for more information and services. Similarly, technological innovations have offered regulators better means to audit the conduct of firms and to enforce securities laws and regulations. Moreover, developments in electronic communication have improved securities markets by permitting pertinent information to be disseminated more broadly, quickly, cost-effectively and equitably.

Enhancements such as the Internet and other technologies that are as yet unanticipated will continue to provide important opportunities to securities firms, investors and regulators alike. Hence, while it is important to be mindful of the challenges new technologies pose, we cannot lose sight of the important opportunities they provide. Thus, we are encouraged that the Commission is dedicated to fostering the use and development of technology rather than impeding it. The stated purpose of the 1995 Release was to assist market participants in using electronic media to provide information under the federal securities laws and to encourage continued research and development and use of such media.⁸ The 1995 Release was, in our view, an important step in integrating the benefits of modern technology into the federal securities disclosure system.

II. OVERVIEW OF COMMENTS ON THE RELEASE

We believe that the Release represents another significant step forward by the SEC because it provides useful and practical guidance to securities firms regarding their use of electronic means to communicate and transact business with clients and potential clients. The SEC's willingness to address the questions raised by emerging technology should comfort and spur investors, the industry, other regulators and market followers to take more advantage of advances in electronic communication.

The Committees propose in this letter some additional areas that the Commission might wish to address in the near term to facilitate even further use and development of electronic media by market participants. In particular, the Committees suggest that the SEC:

- Clarify the status of electronic mail ("e-mail") for purposes of Exchange Act Rules 17a-3 and 17a-4 (the "Record Retention Rules"). A cost-benefit analysis, factoring in the expenses of both retention and retrieval, must be an integral part of any regulatory standards that the SEC develops.
- Clarify permissible methods for delivering non-trade specific information in confirmations. The SEC should allow disclosure of such "generic" information to be delivered apart from trade specific information and incorporated by reference into the confirmation.
- Clarify that electronic delivery of a confirmation does not trigger an

obligation to deliver the related prospectus electronically. Regardless of the medium used to send confirmations, firms should be allowed to satisfy prospectus delivery requirements by making prospectuses available through either traditional means or an electronic medium acceptable to their customers.

- Confirm that securities firms can deliver customer account statements by electronic media. Firms should be able to satisfy account statement delivery requirements by sending electronic statements to those customers that prefer to receive electronic statements in lieu of paper delivery.
- Expeditiously adopt amendments to the Record Retention Rules. Revising the Record Retention Rules in the manner recently discussed among SEC staff and SIA representatives not only will eliminate lingering questions under the SEC's 1993 no-action letter to SIA, but also will provide firms with additional flexibility to satisfy their retention obligations and to serve clients more effectively and at lower costs.
- Continue working with other federal and state regulators and the industry to ensure consistent and uniform standards for electronic communication. SEC guidance and leadership in this area is critical.

III. SPECIFIC COMMENTS ON THE RELEASE

A. Regulatory Requirements for E-Mail.

Firms' use of e-mail with customers raises two significant regulatory questions. The first question is how firms should supervise such e-mail usage. The second question is whether firms be should required to retain e-mail messages and, if so, to what extent and in what manner.

The 1996 SIA Letter did not distinguish between supervision and retention issues for e-mail. The letter simply advocated a regulatory approach focusing on the content and nature of an electronic message rather than the manner of sending it. In SIA's view, the mere fact that an electronic communication, such as e-mail, can be reduced to writing by the recipient, the sender or both -- in and of itself -- does not justify treating that message as correspondence for regulatory purposes. Since electronic communication can be used to distribute different classes of information, including advertising, sales literature, correspondence, or the equivalent of conversation, the 1996 SIA letter urged regulatory authorities to let content govern rather than the mode of delivery.

The SEC states in the Release that broker-dealers' obligations regarding communications with the public, including electronic communications, are regulated by self-regulatory organizations (SROs) rather than the SEC.⁹ The SEC in the Release strongly encourages SROs to work with firms to adapt supervisory review requirements that accommodate such communication and that are based on the content and audience of the message rather than merely the electronic form of the communication.¹⁰ We are pleased that the Commission embraced the position

advocated in the 1996 SIA Letter regarding supervision of e-mail and encouraged SROs to follow suit.¹¹

Representatives of certain SROs have informed us that they are, in fact, actively reviewing their rules and interpretations and considering changes that may be appropriate to foster the use of electronic communication by member firms. For instance, The New York Stock Exchange, Inc. (the "NYSE") recently formed an Electronic Communication Committee comprised of representatives from a broad spectrum of its membership to develop recommendations for revisions to NYSE rules and interpretations governing the supervision of communications (including electronic communications) with customers. Some members of the Committees serve on that NYSE committee.¹²

In a July 10, 1996 meeting between SIA and the NYSE, we were told that staff expects the NYSE Board of Directors to vote on a proposal in September 1996 to amend NYSE rules and provide interpretive guidance regarding supervision of communications with the public and the retention of such communications.¹³ The proposals, we were informed, would clarify that certain defined categories of communication -- such as advertising, sales literature and research reports (communications that can be sent by e-mail) -- require supervisory review and approval prior to use. However, remaining categories of communication -- including other kinds of e-mail communications -- would be subject only to the general requirement that firms reasonably supervise and control the activities of their employees. The burden would be on the firms to demonstrate the reasonableness of the supervisory procedures that they adopt for these types of e-mail.

The Committees support an amendment to or clarification of NYSE rules along the foregoing lines. The adoption of a one-size fits-all rule (e.g., requiring that all e-mail be reviewed prior to use) would effectively block the development and use of e-mail. Maximum flexibility at this juncture is critical. Firms need latitude to experiment with different types of systems and to assess customer demands and preferences. Over time, some methods of supervision for e-mail most likely will emerge as more effective than others and, as a consequence, some will be deemed to be more "reasonable" than others. We note that what is reasonable for one firm may not necessarily be reasonable for another. The method of supervision required will vary from firm to firm, and perhaps from one part of a firm to another. A system of supervision for e-mail should be tailored to best assure optimal cost-effective compliance, depending on the nature of the firm's business and its personnel.

The National Association of Securities Dealers, Inc. (the "NASD") similarly took a number of recent steps to clarify the application of its rules to advances in electronic communication. The NASD provided interpretive guidance in April 1996 on the applicability of NASD rules to various electronic media, including World Wide Web sites, bulletin boards, group and individual e-mail and chat rooms.¹⁴ The section on individual e-mail in the interpretation states that when registered persons use e-mail "in lieu of written correspondence" for soliciting or executing securities transactions, NASD rules require review and endorsement by a registered principal. At a meeting

between the NASD and SIA on June 5, 1996, we were told that NASD staff carefully chose the phrase "in lieu of written correspondence" to capture only e-mail messages intended as written correspondence. NASD staff explained that the NASD did not intend to require review and approval for e-mail messages more akin to oral conversation and that it wants to be flexible regarding the application of its rules to technology.¹⁵

The SEC's strong encouragement in the Release for SROs to work with broker-dealers to adapt their supervisory review requirements to accommodate firms' use of electronic communication is helpful. The rule changes and interpretations on supervision of e-mail that the NASD and NYSE have issued or proposed, or expect to issue, are likewise valuable and constructive. Nevertheless, these actions do not address the second major regulatory question regarding e-mail -- namely, whether firms should be required to retain records of e-mail messages to and from customers and, if so, to what extent and in what manner.

The Release covers record retention requirements for e-mail only tangentially in a footnote. The SEC states in the footnote that "firms should maintain effective supervision and records of associated persons' communications to avoid potential sales practice problems."¹⁶ Also in that footnote, the Commission -- acknowledging broker-dealers' concerns about the costs of maintaining electronic communications as records on a long-term basis -- announces that it "intends to discuss these concerns further with the securities industry."¹⁷

SIA welcomes the opportunity to discuss an appropriate framework for retention of e-mail and other electronic communication. The Committees strongly believe that a cost-benefit analysis must be an integral part of any regulatory standards considered. The equation must factor in not only the technical capability of firms to retain and retrieve e-mail, but the costs of doing so as well.

Although SIA has not yet conducted an extensive survey of its membership, we have begun investigating the various ways in which e-mail might be instituted and used at securities firms and the associated costs. Based on these preliminary examinations, we believe that the annual costs to an averaged-sized retail firm to retain all of its employees' e-mail messages would amount to \$1 million - \$10 million. The number would be closer to the upper-end of the range if a greater proportion of messages were complex or contained attachments and closer to the lower-end if the opposite were true. We expect that these figures will escalate proportionately as more customers switch from the telephone to e-mail and as more rely on the Internet and other forms of electronic media as their favored means of communicating with firms and their brokers.

As a general rule of thumb, the more data stored, the greater the cost. Moreover, the costs of retention are only a fraction of the costs of retrieval. In most cases, retrieval costs also depend upon the type of search required. In determining the manner in which firms should be required to retrieve e-mail messages, we urge the SEC to consider retrieval costs generally and the relative costs of different types of searches.

B. Electronically Delivered Confirmations.

The Release contains a catalog of current rules under the Exchange Act and requirements under the Advisers Act to which the Commission's guidance may be applied. One of the items included in the list is Rule 10b-10 under the Exchange Act. Rule 10b-10 requires broker-dealers to give or send confirmation information to customers. The SEC's interpretation, therefore, resolves the issues raised in the 1995 Release regarding Rule 10b-10 by permitting electronic delivery of confirmations.¹⁸ This clarification is important. In order to provide firms with the flexibility they need to satisfy their many customers who no longer wish to receive confirmations in paper form, we suggest going one step further.

We ask the Commission to consider distinguishing two types of disclosure required in confirmations and to permit separate delivery of such disclosure. One type of disclosure required under Rule 10b-10 is trade specific (such as the identity, price and number of shares of the security purchased or sold by the customer). The other type of disclosure is merely generic and applies equally to all confirmed trades (such as a statement that the name of the contraparty to the transaction will be furnished upon request).

For confirmations sent in paper form, securities firms generally use pre-printed forms that contain the generic disclosure. When a transaction is effected, a firm prints the trade specific disclosure onto the pre-printed form and mails the confirmation (containing both the pre-printed generic disclosure and the newly printed trade specific information) to the customer. Generic disclosure typically is much longer than trade specific disclosure and, as a result, often is necessarily set forth in smaller type than trade specific disclosure and included on the back of the pre-printed form to keep confirmations to a manageable size.

We are concerned that the inclusion of generic disclosure on electronically delivered confirmations will render this mode of delivery less practical and more costly. The length of generic disclosure is disproportionate relative to trade specific disclosure. Current industry practices for setting forth generic disclosure on confirmations delivered in paper form (e.g., using pre-printed forms with smaller type on the back of the form) do not translate easily to electronically delivered confirmations. Customers who otherwise would prefer electronic delivery of confirmations might be discouraged from such delivery because of the length of generic disclosure they would be forced to receive with each trade. In fact, the information in which presumably they are most interested, the trade specific disclosure, may be obscured.

We ask the SEC either to provide interpretive guidance or to amend Rule 10b-10 to provide that electronically delivered confirmations need not contain generic disclosure, as long as such disclosure is made available separately to customers and certain conditions are met. We propose the following conditions:

(i) Firms must obtain express customer consent to separate delivery of generic disclosure or demonstrate the customer's actual accessing of the disclosure.¹⁹

(ii) The confirmation containing the trade specific disclosure must make prominent reference to, and incorporate by reference, the generic disclosure. Firms must also provide the Internet location of their Web site (if that is where the generic disclosure can be accessed) or clear instructions as to how customers may otherwise access the generic disclosure, including the ability to request a paper version.

(iii) The generic disclosure must be made available to the customer in a format that requires no additional software or burdensome steps to access.

(iv) If the medium by which the confirmation containing the trade specific information is linked electronically to the medium containing the generic disclosure, firms must provide a hypertext link or a similar mechanism that permits the customer to "point and click" on the appropriate icon or box to access that information.

C. Customer Account Statements.

The Release does not directly address whether securities firms may satisfy their obligation to deliver account statements to customers using electronic media. The Commission sets forth a list in the Release "of all the rules that require or permit communications" between securities firms and customers, and states that its interpretation is intended to cover all optional and required communication under the Exchange Act and Advisers Act.²⁰ A number of the rules included in the list, however, speak to disclosure typically found in account statements.²¹ It seems to us that the SEC has sent a clear signal to SROs that electronic delivery of account statements is contemplated to the same extent as confirmations.

The NYSE and NASD have specific rules on when account statements must be delivered and what the statements must say.²² These SRO rules do not specify the method or media by which account statements must or may be delivered. We think it would be helpful if SROs confirmed that electronic delivery satisfies their rules on sending account statements.

D. Prospectus Delivery.

In the Release, the SEC reminds broker-dealers of their obligations to deliver a prospectus prior to or concurrently with delivery of the related confirmation. The Release further states that "if a confirmation is sent by facsimile, the prospectus also should be sent by facsimile or equally prompt means."²³

We ask the SEC to clarify that the use of electronic means to deliver a confirmation does not trigger a requirement to use the same or other electronic means to deliver a prospectus. Securities firms should be permitted to deliver a prospectus by any means otherwise allowable, as long as such method of delivery provides reasonable assurance that the prospectus will be made available to investors prior to or concurrently with delivery of the confirmation.

Such an approach is entirely consistent with a number of the hypothetical examples set forth in the 1995 Release.²⁴ In one example, the issuer places its final prospectus on its Internet Web site and then confirms by mail the sale of securities to those

investors who consented to electronic delivery. The confirmation states that the final prospectus is available on the issuer's Web site.²⁵ The SEC concluded in the 1995 Release that this would satisfy delivery obligations because it is reasonable to assume that investors who have consented to delivery of the final prospectus via an Internet Web site have the ability to access the final prospectus once such investors are supplied with notice of the Internet location of the Web site.

The same should hold true when a confirmation is sent by facsimile or other electronic media. If firms have reasonable assurance that investors have the ability to access the related prospectus at or prior to the time that confirmations are sent, firms should be deemed to satisfy their prospectus delivery requirement, regardless of whether the prospectus is sent "by facsimile or equally prompt means." Reasonable assurance would include customers' express consent to delivery of the prospectus via an Internet Web site, customers' actual accessing of the prospectus on the Web site or any of the other methods described in the examples contained in the 1995 Release.

Another example in the 1995 Release describes an issuer that places its final prospectus on its Internet Web site.²⁶ The issuer's underwriter mails confirmations to all purchasers and, concurrently, sends e-mail notice of the location of the Internet Web site where the final prospectus is available. For purchasers without an e-mail address, the underwriter mails notice of the location of the Internet Web site with the confirmation. The Commission declared in the 1995 Release that this method satisfies the delivery requirement because the notice makes investors aware of the availability and location of the electronic document.

Again, the same conclusion should be reached when a confirmation is sent by facsimile or other electronic means. As long as the confirmation makes customers aware of the availability and location of the prospectus, and firms have reasonable assurances that customers have the ability to access the prospectus without undue burden, the manner used to make the prospectus available should be irrelevant.

The Commission should not mandate the manner in which firms must send or make available prospectuses, nor limit customers' options for obtaining prospectuses in the form they desire. Electronic delivery of prospectuses in every case in which confirmations are sent by facsimile or other electronic means is not practical, necessary or desired by customers. It will add burdens and expenses that do not appear to us to be justified. Whereas confirmations in paper form tend to be shorter than a full single page, prospectuses in paper form generally run at least 30 or 40 pages and not uncommonly are over 100 pages. Requiring electronic delivery of prospectuses strikes us as contrary to the flexibility that the SEC exhibits in other parts of the Release and the 1995 Release.

E. Record Retention Issues Generally.

As noted in the Release, the Commission in 1993 confirmed to SIA's Ad Hoc Record Retention Committee (the "Records Committee") that it would not take action if broker-dealers used optical disk technology to satisfy their obligations under the Record Retention Rules, provided that broker-dealers meet ten specified conditions.

²⁷ Simultaneously with the issuance of the 1993 no-action letter, the SEC proposed amendments to the Record Retention Rules to codify the relief in the letter. ²⁸ The SEC has taken no formal action on the release to date. In February 1996, the Records Committee submitted a letter to the SEC to clarify some lingering questions under the 1993 no-action letter. ²⁹

The Commission states in the Release that it "is aware that questions have been raised regarding the application of the optical storage no-action letter" and that staff of the Division of Market Regulation "is prepared to discuss with interested persons" any issues in connection with that letter and the Release. ³⁰ SEC staff informed SIA that a draft release adopting amendments to Rule 17a-4 is being circulated internally at the SEC. In its current form, we understand that the release would amend the Record Retention Rules to permit broker-dealers to use any technology for retaining records, provided that the ten conditions for the use of optical storage technology contained in the 1993 no-action letter are satisfied and certain other requirements are met.

We hope that the adoption of the rule change is imminent. A final rule within the foregoing parameters not only would resolve the issues set forth in SIA's February 1996 letter, but also would put to rest those questions stemming from the SEC's 1993 no-action letter and 1993 release. Such resolution would permit firms to move forward with record retention and retrieval systems that should allow them to operate more efficiently and cost effectively and better serve the needs of their clients.

F. Need for Regulatory Coordination and SEC Leadership.

The Release explicitly states that it does not address or affect the applicability of any SRO rules or any state laws and that broker-dealers, transfer agents and investment advisers must continue to consider the applicability of such rules and laws in connection with delivering information electronically. ³¹ We recognize the jurisdictional limitations that the SEC faces and the balance it must maintain vis-à-vis other federal and state securities regulators.

Nevertheless, SIA believes that the Commission is uniquely positioned among the securities regulators to forestall the adoption of piecemeal and inconsistent regulatory approaches to new technology. Many representatives of SROs and state securities commissions that recently met or spoke with industry representatives, for example, have stated that they often look to the SEC for guidance and would wait to amend their rules until the SEC expressed its views in the Release and the 1995 Release.

We believe that many of the rules currently applicable to securities firms are outdated and cannot be applied practically to advances in technology that have occurred since the rules were adopted. Consequently, we are encouraged by the language included in the Release urging SROs to work with broker-dealers to adapt supervisory review requirements governing communications with customers to accommodate the use of electronic communications. We believe that the multi-jurisdictional nature of media like the Internet calls for a coordinated regulatory approach that heretofore has not been as critical.

IV. CONCLUSION

Again, we wish to commend the Commission for the useful interpretative guidance it provides in the Release. The overall tone and scope of the Release are encouraging and represent a positive step forward in addressing this multi-faceted and fast-moving area. We hope that the SEC continues to examine how its rules may need to change to keep pace with advances in technology and the escalating use of electronic media. In that regard, we have set forth above our suggestions for the areas on which the Commission might wish to focus.

Should you have any questions regarding our suggestions or would like any further information, please do hesitate to contact the undersigned, Kenneth S. Spirer, at 212-449-9699, or C. Evan Stewart, at 212-416-5441.

Very truly yours,

C. Evan Stewart,
Chair
SIA's Federal Regulation Committee

Kenneth S. Spirer,
Chair
Technology Regulatory Subcommittee of SIA's Technology Issues Committee

cc:

Commissioner Steven M.H. Wallman
Richard L. Lindsey, Director, Division of Market Regulation
Brian J. Lane, Director, Division of Corporation Finance
Catherine C. McGuire, Chief Counsel, Division of Market Regulation
Michael A. Macchiaroli, Associate Director, Division of Market Regulation
Edward Kwalwasser, Group Executive Vice President, New York Stock Exchange
R. Clark Hooper, Senior Vice President, NASD Regulation, Inc.

Footnotes:

¹ SIA's Technology Issues Committee formed the Technology Regulatory Subcommittee to accomplish its compliance and regulatory goals; namely, monitoring and responding to regulatory and legislative proposals having a potential impact on the use of technology by the securities industry and initiating action for the purpose of ensuring coordinated regulation and enabling the more practical and efficient use of technology. The Subcommittee consists of representatives from 14 SIA committees and groups which, in turn, have representation from approximately 335 member firms.

The Federal Regulation Committee provides a forum for heads of SIA members' legal departments to initiate and respond to regulatory and legislative proposals generally affecting the securities industry.

² SIA is the leading proponent of capital markets, bringing together the shared interests of about 700 securities firms throughout North America to accomplish

common goals. SIA members -- including investment banks, broker-dealers, specialists, and mutual fund companies -- are active in all markets and in all phases of corporate and public finance. In the U.S., SIA members collectively account for approximately 90%, or \$100 billion, of securities firms' revenues and employ about 350,000 individuals. They manage the accounts of more than 50-million investors directly and tens of millions of investors indirectly through corporate, thrift and pension plans.

³ SEC Release No. 33-7288, 34-37182, IC-21945, published in 61 Federal Register at 24,644 (May 15, 1996).

⁴See SEC Release No. 33-7233, 34-36345, IC-21399 (October 6, 1995), published in 60 Federal Register at 53,458 (October 13, 1995).

⁵See Letter, dated December 4, 1995, from Robert F. Price, Chairman, SIA's Federal Regulation Committee, to Jonathan G. Katz, Secretary, SEC.

⁶A copy of the Letter, dated January 25, 1996, from Stuart J. Kaswell, SIA's Senior Vice President & General Counsel, to Steven M. H. Wallman, SEC Commissioner, is attached hereto as Exhibit A.

⁷ We use the term "securities firms" interchangeably in this letter to refer to broker-dealers, investment advisers and, where applicable, transfer agents.

⁸ See 1995 Release, 60 Federal Register at 53,458.

⁹ See footnote 5 of the Release and the text accompanying that footnote.

¹⁰ Id. (emphasis added).

¹¹Id. The SEC states in footnote 5 that "SROs should consider whether electronic mail communications, that, as a practical matter, replace or substitute for telephone conversations, in many cases would not require advance authorization or prior supervisory review."

¹² The NYSE also surveyed its membership early in 1996 regarding current and planned uses of technology in their businesses. See NYSE Information Memorandum 96-1 (January 12, 1996).

¹³ The rules in question are NYSE Rule 342 ("Offices - Approval, Supervision and Control"), ¶2342 NYSE Guide (CCH 1996), NYSE Rule 472 ("Communications with the Public"), ¶2472 NYSE Guide (CCH 1996) and NYSE Rule 440 ("Books and Records"), ¶2440 NYSE Guide (CCH 1996).

¹⁴See "Ask the Analyst About Electronic Communications," NASD Regulatory & Compliance Alert at pp. 4-6 (April 1996). The NASD also amended its rules in 1995 to include electronic communications in the definitions of "advertising" and "sales literature." See NASD Notice to Members 95-74 (Sept. 1995) (notifying members of the SEC's approval, inter alia, of amendments to Article III, Section 35 of the NASD's Rules of Fair Practice).

¹⁵ The NASD has taken other steps on technology as well. It recently announced that it intends to distribute a survey to its members similar to the one circulated by the NYSE and to compile results by the third quarter of 1996. Additionally, the NASD issued a notice emphasizing members' supervisory and regulatory responsibilities, as well as their obligations to customers, when dealing with securities promoted on electronic media and their supervisory obligations regarding their associated persons' use of such media. See NASD Notice to Members 96-50 ("Supervisory and Other Obligations Related to Use of Electronic Media") (July 1996).

¹⁶ See footnote 5 of the Release (emphasis added).

¹⁷ Id.

¹⁸ See footnote 38 of the Release.

¹⁹ The SEC recognized in the 1995 Release that consent could, in some cases, make effective an otherwise ineffective electronic delivery. In example 1 of the 1995 Release, for instance, a company places its final prospectus on its Internet Web site and then confirms by mail the sale of securities to investors with a note stating that the final prospectus is available on its Web site and giving the Internet location of the Web site. The SEC stated that, absent other factors, these procedures would not satisfy delivery requirements under the Securities Act of 1933 because not all investors purchasing securities could be presumed to have the ability to access the final prospectus via an Internet Web site. The "other factors" that the SEC cites are "express consent from the investor or an investor's actually accessing the document on the Web site." See the 1995 Release, 60 Federal Register at 53,461.

²⁰ See the Release, at 24,648.

²¹ See, e.g., Rule 15c3-2 (disclosure of customers' free credit balances on account statements at least quarterly) and Rule 11Ac1-3 (disclosure of policies relating to payment for order flow and order routing).

²² See NYSE Rule 409, ¶ 2409 NYSE Guide (CCH 1996), and NASD Conduct Rule 2340, p. 4293 NASD Manual (CCH 1996).

²³ See footnote 38 of the Release.

²⁴ The 1995 Release did not contain any hypothetical examples of confirmations being sent by facsimile or other electronic means because the question of whether such delivery was effective was not resolved until the issuance of the Release. See footnote 12 of the 1995 Release and footnote 38 of the Release.

²⁵ See Example 2 in the 1995 Release, 60 Federal Register at 53,461.

²⁶ See Example 10 in the 1995 Release.

²⁷ See SEC No-Action Letter, dated June 18, 1993, from Michael A. Macchiaroli, Associate Director, SEC's Division of Market Regulation, to Michael D. Udoff, Chairman, SIA's Ad Hoc Record Retention Committee. The ten conditions essentially

address three matters: durability (the storage media must last for the required retention period), accessibility (regulators must be assured of access to the media by a third party) and alterability (the media must be in WORM -- Write Once Read Many -- format that prevents alteration of the data).

²⁸ See Exchange Act Release No. 32609 (July 9, 1993). SIA submitted a comment letter on the release, stating that certain aspects of the proposed rule would impose undue burdens on broker-dealers. SIA sought relief for the use of any technology that satisfies the conditions for the use of optical storage technology set forth in the 1993 no-action letter. See Letter, dated September 30, 1993, from David E. Rosedahl, Chairman, SIA's Federal Regulation Committee, and Michael D. Udoff, Chairman, SIA's Ad Hoc Record Retention Committee, to Jonathan Katz, Secretary, SEC.

²⁹ See Letter, dated February 15, 1996, from Mark A. Egert, SIA Assistant General Counsel, to Michael A. Macchiaroli, Associate Director, SEC's Division of Market Regulation. In particular, SIA asked SEC staff to clarify that (i) CD-ROMs are optical disks (and, as such, a form of optical storage medium covered by the 1993 no-action letter) and (ii) the SEC's reference in the letter to the ablative methodology for achieving WORM functionality was used strictly as an example and not as a requirement.

³⁰ See footnote 4 of the Release.

³¹ See footnotes 5 and 6 of the Release and the text accompanying those footnotes. Footnote 5 cites SRO rules governing member firm responsibilities relating to communications with the public, including electronic communications.

For more information, please contact [Stuart Kaswell](#).