



February 16, 2021

**VIA Electronic Mail: [pubcom@finra.org](mailto:pubcom@finra.org)**

Jennifer Piorko Mitchell  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

**Re: Regulatory Notice 20-42: FINRA Seeks Comment on Lessons from the COVID-19 Pandemic**

Dear Ms. Mitchell:

The Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> submits this letter to the Financial Industry Regulatory Authority Inc.’s (“FINRA”) request for public comment in light of lessons learned from firms’ experiences from the COVID-19 pandemic.<sup>2</sup> We welcome this opportunity to share with FINRA the concerns and recommendations of our members as we all continue to weather the current health crisis and assess the potential takeaways for the financial industry.

SIFMA and its members would like to give their thanks to FINRA and its staff for their extraordinary efforts during the COVID-19 pandemic. FINRA has been an outstanding partner in coordinating with the industry and responding to the challenges presented by COVID-19. As we continue to navigate these uncertain times, we anticipate our engagement with FINRA will continue to be fruitful as we establish a new normal and FINRA determines how to regulate in a post-COVID-19 world.

Although the introduction of vaccines for COVID-19 provides promise for the future, in many respects and localities, the pandemic is continuing to worsen.<sup>3</sup> Firms are still wrestling

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<sup>1</sup> SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry’s nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

<sup>2</sup> FINRA, Regulatory Notice 20-42, *FINRA Seeks Comment on Lessons From the COVID-19 Pandemic* (Dec. 16, 2020), <https://www.finra.org/rules-guidance/notices/20-42>.

<sup>3</sup> See, e.g., Peter Sullivan, *Fauci warns COVID-19 situation “potentially could get worse” given new variants*, THE HILL (Jan. 28, 2021), <https://thehill.com/policy/healthcare/536267-fauci-warns-covid-19-situation-potentially->



with the operational changes triggered by the pandemic and evaluating the short-term and long-term impacts. As such, our comments provided in this letter are preliminary and subject to refinement as the pandemic runs its course and a new normal manifests itself more clearly.

This letter highlights some core areas of concern and suggests possible changes or solutions that SIFMA and its members believe would be beneficial and reflect the leaps the industry has made, notably around remote work and supervision, in response to the crisis. However, as we offer several sweeping proposals, we also recognize the importance of reaching the correct outcomes, and stand ready to deepen the dialogue as FINRA defines safeguards and seeks to modernize standards where appropriate.

## ***I. Various Key Concerns Raised by COVID-19 Pandemic***

### ***a. Supervision***

The current FINRA regulatory framework provides for different types of work locations with regulatory consequences both attaching to the type of location and scope of activities performed at the location. The structure for location registration and supervision is then based on the nature of the activity or the supervisory role of the person conducting the activity. The almost fully remote work environment that has been forced upon the industry by the pandemic, with the exception of certain customer-facing activities, has brought about a quantum leap towards the adoption of fully remote capabilities, work habits, procedures and controls. For almost a year the industry has operated largely on a remote basis and has shown through this “pilot program” that it can properly supervise its various locations, registered representatives, and lines of business in remote locations without compromising our commitment to investor protection. The financial industry is not alone in this trend, and the shift towards remote work is only growing, as many industries are adopting permanent remote work arrangements, even after COVID-19.<sup>4</sup>

At least for firms of sufficient sophistication, the rapid adoption of near 100% remote work practices has showcased capabilities built up over the last decade that allow firms to conduct the full scope of their business activities electronically. These capabilities are location agnostic, even if, before the pandemic, they had been largely utilized from within brick-and-mortar locations, whether designated as an office of supervisory jurisdiction (“OSJ”), branch office or non-branch location. However, because of modern technology, whether a supervisor

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could-get-worse-given-new; Holly Yan, *Don't ignore this headline: The pandemic is getting worse. What happens next is up to you*, CNN (Jan. 15, 2021), <https://www.cnn.com/2021/01/15/health/covid-19-pandemic-getting-worse/index.html>.

<sup>4</sup> See Zoe Schneeweiss, *Third of Staff May Work from Home Permanently Post-Virus*, BLOOMBERG (Jan. 25, 2021), [https://www.bloomberg.com/news/articles/2021-01-25/third-of-staff-may-work-from-home-permanently-post-virus-chart?utm\\_source=flipboard&utm\\_medium=bd&cmpId=flipboard](https://www.bloomberg.com/news/articles/2021-01-25/third-of-staff-may-work-from-home-permanently-post-virus-chart?utm_source=flipboard&utm_medium=bd&cmpId=flipboard).



sits two rows away, in another building across town, or at a remote location no longer diminishes their supervisory capabilities.

We therefore believe that it is time to allow for a conceptual alternative to the current location-based approach to supervision. Below, we outline some proposed conditions that firms should meet in order to avail themselves of such an alternative.

*i. Proposed Conditions for Alternative Work Arrangements*

We believe a risk-based, rather than a location-based, approach to supervision and oversight would be more appropriate for work locations, whether such locations accommodate personnel that are fully remote, partially remote or both. A location should not be required to be registered as an OSJ or a branch office where there is no customer-facing activity or custody of customers' funds or securities, provided that there is a reasonably designed system of supervision in place. Whereas it used to be that many such activities required a physical presence to function or be supervised appropriately, that is no longer the case. Working from an alternate location on occasion, for example, or even once a week, does not introduce heightened risk to clients, markets or member firms. Therefore, registered personnel should be permitted to conduct business from such a location without needing to register that location as a branch and without being subjected to on-site examination as long as the individuals' activities are subject to adequate supervision. Alternative work arrangements that could introduce heightened risk should be evaluated based on a set of additional criteria to ensure supervision and oversight can be properly administered:

- Prior to being permitted to work at a non-registered location, personnel must demonstrate that they have conducted themselves in a manner exhibiting appropriate standards of professional and ethical conduct, which will be determined by the firm consistent with the following standards:
  - Low incidence of customer complaints, arbitrations or litigation, where the firm has concluded that the personnel's conduct does not merit disciplinary action or heightened supervision; and
  - Outside business activities would not pose a material risk or conflict of interest to the personnel's activities at such location.
- Firms should require that personnel certify at least annually to the firm that they have adhered to the requirements and conditions of the firm.
- The "associated person" (a term which for these purposes should not be defined to include non-registered personnel) attests to the following:



- Maintenance of confidentiality (*e.g.*, information barriers, closed doors, locked screens). Heightened processes would need to be implemented where another person at the same location operates in the same or a related industry (*e.g.*, locked doors or file cabinets); and
- The location is not held out to the public as an office, and the associated person does not meet with customers at the location.
- All books or records required to be made and preserved by the member under the federal securities laws or FINRA rules are maintained by the member other than at the location or maintained in a central location, such as an OSJ.
- All business activities of the associated person must be conducted using solely the firm’s authorized electronic systems and platforms, approved communication channels, and a secure network connection to be provided by the firm.
- Supervisory systems must be capable of monitoring the activity fully, and written supervisory procedures must extend to the activity.
- No handling or maintaining customer funds or securities at the location.<sup>5</sup>

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<sup>5</sup> We find FINRA’s proposal for a “qualifying office” in Regulatory Notice 17-38 instructive for developing a new standard for supervision; however, we believe such definition could be updated and made more flexible to reflect the current landscape. *See* FINRA, Regulatory Notice 17-38, *FINRA Requests Comment on a Proposal to Amend Rule 3110 (Supervision) to Provide Firms the Option to Conduct Remote Inspections of Offices and Locations That Meet Specified Criteria*, (Nov. 13, 2017), <https://www.finra.org/rules-guidance/notices/17-38>.

A “qualifying office” is defined as an office or location that meets the following conditions:

- (1) not more than three associated persons that conduct business for the firm are designated to the location;
- (2) the location is not held out to the public as an office of the firm;
- (3) the associated person(s) at the location conducts business, including electronic communications, on behalf of the member at that location solely through the use of the firm’s authorized electronic systems and platforms;
- (4) all books or records required to be made and preserved by the member under the federal securities laws or FINRA rules are maintained by the member other than at the location;
- (5) no customer funds or securities are handled at the location;
- (6) the location is either (i) not required to be inspected annually pursuant to Rule 3110(c)(1)(A); (ii) designated as an OSJ solely because of the supervisory activities described in Rule 3110(f)(1)(D) through (G) or (iii) designated as a branch office solely because of the supervisory activities described in Rule 3110(f)(2)(B); and
- (7) no registered person at the location has a disciplinary history (as defined in Rule 3170(a)(3)) and no associated person at the location is subject to a statutory disqualification.



- The associated person would be required to report such location(s) to the firm and the firm would maintain a record of such location(s).

If a location is unable to meet the requirements set forth above and also meets the definition of “branch office” or “office of supervisory jurisdiction” (as modified below), only then should the location be required to be registered. The COVID-19 pandemic has proven that it is possible to shift operations to decentralized, remote locations on short notice. However, we recognize the broad range of broker-dealers which FINRA supervises, some of which may neither have the capabilities to conduct activities in a fully electronic manner, nor the financial resources to upgrade to such a paradigm. Therefore, we recognize that the new paradigm should be presented as a complementary framework, and certain capabilities should have to be evidenced before a firm can be allowed to avail itself of this paradigm, such as the ability of the firm to conduct the business for which remote work is permitted in accordance with the requirements set forth above.

Even firms that avail themselves of this alternative could maintain one or more registered offices under the existing regime (modernized as suggested below), where activities require a physical presence for interaction with customers (including face-to-face sales activity, unless conducted on the road) or require holding customer securities or funds.

*ii. Suggested Improvements to Definitions and Related Terms*

We generally support the adoption of a reasonableness or risk-based standard for supervision and registration of work locations. To that effect, we ask that FINRA consider revising the definitions of “branch office” and “office of supervisory jurisdiction” in FINRA Rule 3110(f). These definitions have not been substantively revised for several years; both the COVID-19 pandemic and technological advancements in recent years necessitate these definitions be revisited and revised to keep pace with an evolving workplace and technological landscape.

The COVID-19 pandemic has demonstrated that virtually all of the tasks of personnel at a financial services firm can be done by employees working remotely without on-site supervision. The definitions of branch office and OSJ should be updated to reflect the modern workplace, where nearly all activities are conducted electronically, permit use of remote work locations, and provide greater clarity as to the permitted activities at each such locations. Using current definitions in a modern workplace will result in unreasonable results, such as firms having to register a number of one-person branches at a variety of remote locations or personal residences. Consideration should be given to categories of functions that currently require a branch office or OSJ status. In the meantime, FINRA should also issue additional guidance on the definitions of



OSJ and branch office on a temporary or permanent basis for working remotely, including maintaining appropriate supervision, given an increased number of personnel working remotely.<sup>6</sup>

We would support the following specific changes and clarifications to the definitions in FINRA Rule 3110(f), which we believe are outmoded and unnecessarily impede a modern firm's operations:

- 3110(f)(1)(A): Order execution and market making activities take place almost entirely electronically in the modern day. Although it still makes sense to have the systems that execute such orders be centrally located at a registered office, we do not believe that the person performing order execution, market making or signing off on such activities should be required to be located at an OSJ in situations where orders are executed through centralized electronic firm systems.
- 3110(f)(1)(B): We ask that FINRA limit the activities considered “structuring” to exclude non-customer facing activities as well as presentations, road shows and similar activities that would otherwise trigger an OSJ designation. The current definition provides little clarity as to what activities are captured by “structuring,” and given the modern workplace, where activities are conducted almost entirely electronically, we no longer believe it is appropriate for many activities relating to what could be considered “structuring” be included in the OSJ definition. Further, the notion that road shows or similar presentations could require OSJ registration of the various venues at which they take place is impractical and overly burdensome.
- 3110(f)(1)(C): We ask that FINRA provide further clarification to define “maintaining” custody of customer funds or securities (*i.e.*, does “maintaining” amount to receipt of customer funds or securities or does it require ongoing custody (*e.g.*, a period of greater than 24 hours)). We generally support that the maintenance and custody of funds at an alternative work location is not appropriate, and therefore we recommend that this definition be clarified.
- 3110(f)(1)(D): We ask that FINRA reconsider whether final acceptance (approval) of new accounts on behalf of the member should cause a location to become an OSJ. Many firms now utilize online new account application submissions and conduct their review, approval and retention processes online as well. The current requirement that this activity trigger OSJ status is outdated, as personnel could perform this function

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<sup>6</sup> SIFMA and its members appreciate the steps taken to date to provide guidance with respect to a remote work environment, but additional and updated guidance would be very useful for the industry to guide development of new processes. See, *e.g.*, FINRA, Regulatory Notice 20-16, *FINRA Shares Practices Implemented by Firms to Transition to, and Supervise in, a Remote Work Environment During the COVID-19 Pandemic* (May 28, 2020), <https://www.finra.org/rules-guidance/notices/20-16>.



from a remote location, especially where the supervision of such activities are performed electronically.

- 3110(f)(1)(E): As indicated above, the review and endorsement of customer orders takes place almost entirely through centralized electronic firm systems. As such, FINRA should amend the location-based approach so that for this activity does not trigger OSJ status.
- 3110(f)(1)(F): The requirement that final approval of retail communications should cause a location to be defined as an OSJ is similarly outdated. Many firms now utilize online submission, review approval and retention processes for retail communication materials, which can also be performed remotely.
- 3110(f)(1)(G): The definition of OSJ includes a location where there is responsibility for the supervision of the activities of persons associated with the member at one or more other branch offices of the member. In effect, the location of each supervisor of other supervisors (or other personnel working at a branch office under the current definition) would have to register as an OSJ. In the transition to remote work, we do not believe it is appropriate to keep this activity restricted to an OSJ, particularly where the locations deemed to be branch offices are employees working from home or other remote locations. As stated earlier, most firms have transitioned to remote supervision. Many activities performed in a branch previously required a physical presence to function or be supervised appropriately, but that is no longer the case. We propose that firm personnel be permitted to supervise the business at any location without registering such location.
- 3110(f)(2)(A)(i): We ask that FINRA provide additional clarity around what would be considered “back office functions,” including whether the receipt but not ongoing custody of funds or securities would be encompassed within that phrase.
- 3110(f)(2)(A)(iii): We ask that FINRA eliminate FINRA Rule 3110(f)(2)(A)(iii) and expand FINRA Rule 3110(f)(2)(A)(ii) to include any location (including an associated person’s primary residence) that meets the requirements of FINRA Rule 3110(f)(2)(A)(ii)(a-i) and otherwise eliminate the 30 business days in one calendar year restriction. Provided the available alternative work arrangements, we see no reason to limit these functions to a primary residence where the location meets the privacy and security conditions described above, which includes secondary or vacation locations.
- 3110(f)(2)(B): Given the shift to remote work, we ask that FINRA reconsider whether it is appropriate or necessary for an associated person’s remote work location meeting all of the requirements of FINRA Rule 3110(f)(2)(A)(ii) that is responsible



for supervising only other associated persons' primary residences meeting the requirements of FINRA Rule 3110(f)(2)(A)(ii) to be considered a branch office. In effect, the location of each supervisor (which for back office functions is typically set up as a tiered chain of supervisors) would have to be registered as a branch office. The supervisory activities are conducted almost entirely through monitored firm systems (such as email and online order approval) and by telephone. Provided there are not additional reasons to make such a location a branch office, we think it would be inappropriate to designate it as such.

As FINRA considers updating these definitions, it would be useful if FINRA would issue an FAQ or other guidance providing the interpretation that, in the context of operations or back office personnel, the "supervision chain" requirement in branch office/OSJ definitions will not apply where only certain functions are performed (*e.g.*, back office, not dealing with retail customers, not holding funds/securities, or not effecting securities transactions).

### *iii. Remote Inspections*

FINRA should consider the inspection requirement in tandem with the definitions of branch office and OSJ to develop a system that reflects the benefits and costs of such level of supervision. The current on-site inspection requirement paired with the current OSJ and branch office definitions would result in an incredibly burdensome inspection process for firms as they would be required to account for a number of newly added OSJs and branch offices due to remote work arrangements that would have to be scheduled for inspection without notable benefit.

We reiterate our commitment to remote supervision and remote inspection of office locations as a viable alternative to in-person administration of applicable regulatory requirements.<sup>7</sup> We ask that FINRA use the temporary relief provided during the pandemic, or a hybrid model thereof where travel is not required for lower risk locations, with respect to remote inspections and supervision as a "pilot" program for permanent relief. We are in favor of the long-term adoption of remote inspections for any office location requiring inspection where the risk profile of that location does not warrant an on-site inspection.<sup>8</sup> During the COVID-19 pandemic, FINRA has permitted member firms to perform remote inspections through 2021. While considering more permanent relief, FINRA should allow firms to maintain the ability to

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<sup>7</sup> See SIFMA, Letter from Kevin Zambrowicz to Vanessa Countryman, *Re: File Number SR-FINRA-2020-019: Proposed Rule Change to Temporarily Extend the Time to Complete Office Inspections under FINRA Rule 3110 (Supervision)* (July 28, 2020), available at <https://www.sifma.org/wp-content/uploads/2020/08/SIFMA-Comment-Letter-SR-FINRA-2020-019-as-filed-with-the-SEC-on-7-28-2020-final.pdf>.

<sup>8</sup> In light of our proposed changes to FINRA's location definitions, we anticipate that locations currently designated as an OSJ, branch office or non-branch location could potentially be eligible for remote inspection under a risk-based framework.



perform remote inspections indefinitely. Firms' ability to conduct exams remotely as a feature of the exam process provides needed flexibility to safely and timely complete future inspections beyond the duration of current relief without sacrificing investor protection. The majority of firms' audit programs contain approximately 75-80% of the program that can be conducted remotely, and many firms had <1% of findings that were found at alternative work locations.

FINRA Rule 3110(c) requires member firms to perform inspections of all locations from which associated persons regularly conduct business, including where they are permitted to work remotely.<sup>9</sup> The on-site inspection requirement read into FINRA rules is in many ways a relic of a bygone era, as the workplace has since undergone substantial changes even in the last year.<sup>10</sup> The technological means to conduct remote inspections are widely available. We recommend that any updated interpretation of the inspection requirement should be broad enough to allow technologically challenged firms to continue in-person, but not to force those with the requisite technological capabilities to be subject to in-person inspection requirements. A risk-based regulatory approach to the determination of how and when to conduct an inspection, as referenced herein, could help resolve concerns FINRA may have with this approach. Further, this change could be implemented through issuance of guidance, as FINRA Rule 3110(c) does not require that a firm conduct an on-site physical inspection of office locations.

Rule 3110(c)(1)(C) requires a member to inspect on a regular periodic schedule every non-branch location. In establishing a non-branch location inspection schedule, there is a general presumption that a non-branch location will be inspected at least every three years, even in the absence of any indicators of irregularities or misconduct (*i.e.*, "red flags").<sup>11</sup> If a member establishes a longer periodic inspection schedule, the member must document in its written supervisory and inspection procedures the factors used in determining that a longer periodic inspection cycle is appropriate.<sup>12</sup>

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<sup>9</sup> The SEC has also addressed remote office supervision, highlighting the importance of on-site inspections as part of broker-dealers' good supervisory procedures; however, this publication is from 2004, and much has changed in the nearly 17 years since that time. See SEC, Dep't of Market Regulation, *Staff Legal Bulletin No. 17: Remote Office Supervision* (Mar. 19, 2004), <https://www.sec.gov/interps/legal/mrslb17.htm>.

<sup>10</sup> FINRA has asserted this interpretation through guidance only. See, e.g., FINRA, Regulatory Notice 17-38, *FINRA Requests Comment on a Proposal to Amend Rule 3110 (Supervision) to Provide Firms the Option to Conduct Remote Inspections of Offices and Locations That Meet Specified Criteria Comment Period Expires: January 12, 2018* (Nov. 13, 2017), <https://www.finra.org/rules-guidance/notices/17-38> ("FINRA has interpreted the rule to require that inspections take place on-site."); FINRA, Regulatory Notice 11-54, *FINRA and the SEC Issue Joint Guidance on Effective Policies and Procedures for Broker-Dealer Branch Inspections* (Nov. 2011), <https://www.finra.org/rules-guidance/notices/11-54> ("[a] broker-dealer must conduct on-site inspections of each of its office locations.").

<sup>11</sup> See FINRA Rule 3110, Supplemental Material .13.

<sup>12</sup> *Id.*



We do not believe that each location currently subject to the inspection requirement warrants inspection where it does not engage in activities that present material risk of misconduct or harm. For example, locations with permissively registered individuals, locations with non-sales clerical staff, and locations where only supervisory activities are carried out do not implicate the same level of risk as locations with conduct that requires further regulatory scrutiny. In line with our suggestions for the definitions of OSJ and branch office, inspections should only be mandatory for locations where firm personnel meet with customers, where the firm holds customer securities or funds, or any other locations that a firm determines after conducting a risk-based analysis (e.g., a location with personnel subject to heightened supervision).<sup>13</sup>

If FINRA insists upon continued inspection of these locations, we suggest that a remote inspection with a risk-based approach to inspection schedules would be more appropriate and would alleviate the burden on firms to inspect low-risk locations, which have grown in number, and are expected to grow further, as many move to alternative work arrangements.

Many inspection functions have been modernized to be performed electronically; much of the inspection, including account reviews, is conducted prior to any on-site visit, using firm systems and data, document retention databases and online filing cabinet functions. Other aspects of inspections can be conducted through internet searches, including social media sites to verify the personnel compliance with firm policies regarding electronic communications, social media and outside activity requirements. We believe these processes alleviate the need for on-site inspections of most business locations. A remote inspection should be the default, and if

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<sup>13</sup> FINRA's own examination program is risk-based and examines firms' size, examination and disciplinary history, or approach to, among other things, business practices, hiring practices, due diligence, suitability, supervision, and financial and operational risks. *FINRA Examination Program Improvements*, <https://www.finra.org/about/finra-360/progress-report/exam-program>. The SEC's Division of Examinations also uses a risk-based examination approach. See, e.g., *Statement on the Renaming of the Office of Compliance Inspections and Examinations to the Division of Examinations* (Dec. 17, 2020) (stating "[t]he Division is primarily responsible for conducting risk-based examinations of entities registered with the SEC"), <https://www.sec.gov/news/public-statement/joint-statement-division-examinations>. The federal bank regulatory agencies also follow a risk-based approach. See, e.g., *Federal Reserve SR 19-9: Bank Exams Tailored to Risk (BETR)* (June 3, 2019), <https://www.federalreserve.gov/supervisionreg/srletters/sr1909.htm>.

Additionally, there is support for a similar approach proposed by FINRA in Regulatory Notice 17-38, which permits firms to conduct remote inspections of "qualifying offices," which generally implicate a lower risk profile based on the activities conducted there and the supervisory structures in place. See FINRA, Regulatory Notice 17-38, *FINRA Requests Comment on a Proposal to Amend Rule 3110 (Supervision) to Provide Firms the Option to Conduct Remote Inspections of Offices and Locations That Meet Specified Criteria* (Nov. 13, 2017), <https://www.finra.org/rules-guidance/notices/17-38>.



firms determine that there are additional risks, only then should an on-site inspection be warranted. If significant concerns are discovered within a location that cannot be addressed in a virtual environment, an on-site inspection could be conducted. FINRA and the SEC both implement remote capabilities when conducting examinations and have been operating remotely since the early days of the pandemic.<sup>14</sup> Firms with the capability to do so should be afforded the same opportunity.

In order to implement risk-based inspection scheduling, we recommend that FINRA remove the annual requirement of FINRA Rule 3110.12 and the FINRA Rule 3110.13 presumption that such locations require inspection at least every three years in favor of a risk-based schedule. Risk factors weighed by firms, such as business conducted, access to firm books and records, heightened supervision of certain persons, and access to firm capital, could be documented. This process would allow for greater flexibility in handling supervision of lower risk areas of firm business without increasing risk of customer harm and would significantly lower costs on firms as more employees work more frequently from remote locations. We also ask that any risk-based schedule should not have minimum requirements that exceed current minimum inspection schedule requirements, which we believe should also be reconsidered in light of the changes proposed herein.

#### b. Qualification Examinations

We would like to bring to FINRA's attention that SIFMA member firms are reporting issues with scheduling qualification examinations due to lack of availability at Prometric given the social distancing and capacity requirements adopted by various jurisdictions, among other constraints.<sup>15</sup> We appreciate the flexibility with which FINRA has addressed the issues relating to exam scheduling to date.<sup>16</sup> It would be useful, however, for FINRA to consider allowing additional testing vendors to administer qualification examinations in order to mitigate lack of availability for testing centers and ensure that registered personnel can complete their

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<sup>14</sup> See *id.* FINRA examination staff utilizes Request Manager, a software tool, to manage information requests through the FINRA Gateway. Additionally, both FINRA and SEC staff have largely been operating remotely since the beginning of the pandemic. See *Regulatory Operations Update*, <https://www.finra.org/rules-guidance/key-topics/covid-19/regulatory-operations-update> (last accessed Feb. 1, 2021). See also SEC, *OCIE Statement on Operations and Exams – Health, Safety, Investor Protection and Continued Operations are our Priorities* (Mar. 23, 2020), <https://www.sec.gov/ocie/announcement/ocie-statement-operations-health-safety-investor-protection-and-continued>.

<sup>15</sup> FINRA has noted that while most Prometric test centers in the U.S. and Canada are open, they are either at full or limited capacity as of December 31, 2020. See [www.finra.org/rules-guidance/key-topics/covid-19/exams](https://www.finra.org/rules-guidance/key-topics/covid-19/exams).

<sup>16</sup> The availability of online testing for certain exams and the extension of in-person exam enrollment windows, among other relief, has been a tremendous help to firms and their personnel struggling to schedule qualification examinations during the pandemic. See *id.*; <https://www.finra.org/rules-guidance/key-topics/covid-19/faq#qe>. See also <https://www.finra.org/rules-guidance/key-topics/covid-19/exams>.



examinations in a timely manner. Given the constraints on in-person testing, we also believe it would be beneficial to expand the capacity for remote/online examinations. Additional online testing would promote the health and safety of test takers and administrators alike at a time when COVID-19 transmission rates are surging in many places.

Further, we believe that remote/online testing has been shown to be a viable option for the future of qualification examinations.<sup>17</sup> SIFMA and its members support the continuation of remote/online testing after the pandemic and would like to see the scope of remote/online testing expanded to include all FINRA qualification examinations. Given advances in modern technology and video software, we believe a remotely proctored online examination should be a workable alternative and would remove barriers to persons unable to visit in-person testing centers. We additionally see no reason not to extend availability of online testing to all types of qualification examinations given the format of the tests.

### c. Reporting Requirements

SIFMA would like to pass along the gratitude of its members for the relief from reporting requirements FINRA has provided to date.<sup>18</sup> FINRA's continued attention to the needs of industry participants has been an important part of keeping firm operations running as smoothly as possible. Coming out of the COVID-19 pandemic and after expiration of shorter term relief, firms will need to address a number of reporting issues that have arisen as a result of the pandemic. In particular, firms will need to address a large number of Forms U4/U5 and Form BR filings that were previously subject to relief as they emerge into a vastly changed work environment.

The "wet signature" requirement under FINRA Rule 1010 is one opportunity to provide permanent relief. We request that FINRA eliminate the requirement from FINRA Rule 1010(c) that every initial and transfer electronic Form U4 filing be based on a manually signed Form U4 provided to the member or applicant for membership. With respect to Form U4, current FINRA guidance due to the pandemic is to obtain a manual signature as soon as practicable.<sup>19</sup> However, some firms continue to operate according to their business continuity plans, under which wet

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<sup>17</sup> See, e.g., NFA, Notice to Members I-21-03, *Remote Online Testing Available for Candidates Seeking to Take Futures Industry Proficiency Examinations* (Jan. 19, 2021), <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5321>. FINRA administers the futures industry proficiency exams on behalf of the NFA (Series 3, 30, 31, 32, and 34). Beginning on January 19, 2021, candidates may choose to take these exams either at a local Prometric test center or remotely proctored online.

<sup>18</sup> See, e.g., FINRA, Regulatory Notice 20-08, *Pandemic-Related Business Continuity Planning, Guidance and Regulatory Relief* (Mar. 9, 2020), <https://www.finra.org/rules-guidance/notices/20-08>.

<sup>19</sup> See *Frequently Asked Questions Related to Regulatory Relief Due to the Coronavirus Pandemic*, <https://www.finra.org/rules-guidance/key-topics/covid-19/faq>.



signatures are not promptly obtained. Obtaining so many manual signatures retroactively would be resource intensive and time consuming for many firms. We believe electronic signatures that comply with current legislation are a valid alternative and would alleviate this concern for filings submitted during the pandemic and on a going-forward basis. FINRA should reevaluate the need for a wet signature requirement in light of these considerations.

The continued transition to remote work and alternative work arrangements will present additional difficulties as firms attempt to remain current with regulatory filings. This is of particular concern considering the scope of duties that registered personnel are now performing from non-registered locations. Under current FINRA rules, firms will need to account for a vastly increased number of work locations on Form U4 and Form BR, including remote work locations of registered representatives. As discussed herein, we believe modifications to the definitions under FINRA Rule 3110(f) could go a long way in alleviating the burden on firms to maintain and report on personnel work locations. We also propose that FINRA either amend Form U4 and Form BR or provide additional FAQs or interpretations through regulatory notices that would narrow the scope of reportable information on the forms to account for the significant uptick in the number and scope of remote work arrangements.

We also ask that FINRA eliminate the requirement that a firm deliver a hard copy of Form U5 to formerly associated persons under FINRA By-Laws.<sup>20</sup> The current hard copy delivery requirement is outdated given the shift to electronic communications and document delivery. In lieu of hard copy delivery, registered representatives could access Forms U5 through the Financial Professional (FinPro) Gateway. Firms could also collect a working personal email for registered representatives and notify them directly via email at termination that the Form U5 is available in the FinPro Gateway for their review.

In addition to these specific recommendations, we ask that FINRA be patient with firms as they work to achieve compliance with their regulatory filings and provide an adequate time frame for firms to acclimate prior to eliminating relief.

#### d. Fingerprinting

The current fingerprinting requirement could also be updated to reduce the burden on firms and fingerprinted employees without losing its protective effect.<sup>21</sup> We recognize the importance of fingerprinting financial professionals and those who work in this industry; however, the current requirement that employees be fingerprinted prior to each instance of employment should be reevaluated.

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<sup>20</sup> FINRA By-Laws, Section 3.

<sup>21</sup> FINRA Rule 1010(d).



We suggest that employees need only be fingerprinted once when they initially join a FINRA member firm. Using the electronic fingerprint-scanning process that is already in place, FINRA could maintain the fingerprint record and rerun the fingerprints through the FBI's database each time an individual changes firms. This process would negate the requirement that firms maintain these records and provide greater centralization to make fingerprint collection and retention more efficient. The idea that an employee's fingerprint might change is remote, such that the employee should not be required to continually re-take fingerprints. As a potential alternative solution, FINRA could eliminate fingerprinting triggered by an employment change and simply require that employees retake fingerprints on a predetermined schedule (*e.g.*, every three years).

In order to facilitate the modernization of this process, we propose several recommendations for FINRA's consideration:

- FINRA (or one or more authorized third party vendors) could maintain fingerprint records;
- Mandate that all fingerprints would be initially captured by an authorized vendor, which shall ensure the quality of the fingerprints and verify the identity of the individual (*e.g.*, by collecting two forms of valid identification);
- Permit firms to access fingerprints at will in order to allow firms to keep such records in an easily accessible place; and
- Permit personnel to resubmit fingerprints at will so that firms may rescreen personnel on a more frequent basis, as they may deem appropriate.

We would be interested in hearing FINRA's views on how it might implement a modernization plan for fingerprinting in light of the considerations listed above and in accordance with Rule 17f-2 under the Securities Exchange Act of 1934 as well as the rules of other regulatory bodies that may have similar fingerprinting requirements.



e. Office Expansion Safe Harbor (IM-1011-1)

FINRA IM-1011-1 provides interpretive guidance that ultimately restricts the number of office locations that a firm may add each year without submitting a continuing membership application for approval to expand its business under FINRA Rule 1017.<sup>22</sup> FINRA has provided temporary relief from this restriction in Regulatory Notice 20-08 in that member firms are not required to submit branch office applications on Form BR for any newly opened temporary office locations, re-locations or space-sharing arrangements established as a result of COVID-19.<sup>23</sup> Since the issuance of Regulatory Notice 20-08, many firm personnel have transitioned to remote work, either from their personal residence or another location, such as a shared office. Many SIFMA member firms are also considering implementation of alternative working arrangements after COVID-19, so the short-term solutions provided by Regulatory Notice 20-08 are insufficient to meet the changing operations needs of the industry.

The application requirement for a business expansion under FINRA Rule 1017 is laborious and expensive, particularly in the context of including a host of personnel working remotely that does not amount to a substantive change in the type or scope of the firm’s business. We propose three potential solutions for FINRA’s consideration:

- Remove the requirement to submit a continuing membership application under FINRA Rule 1017 as part of the IM-1011-1 Safe Harbor for Business Expansion if a member firm (not categorized as a disciplined firm as defined under FINRA Rule 3170) would like to expand the number of office locations with no material change to the products and services being offered by the member firm.
- Carve out certain types of office locations, including a primary residence, from the business expansion application requirement. This could be effected in tandem with redefining “OSJ,” “branch office” and “non-branch location.”
- Expand the annual thresholds for new offices in IM-1011-01.

<sup>22</sup> FINRA, Interpretive Material, IM-1011-1, <https://www.finra.org/rules-guidance/rulebooks/finra-rules/im-1011-1>. The current annual limits for office expansions are detailed below:

<i>Number of Offices (registered or unregistered)</i>	<i>Safe Harbor — Increase Permitted Within One Year Period Without Rule 1017 Application</i>
1–5	3 offices
6 or more	3 offices or a 30 percent increase, whichever is greater

<sup>23</sup> See FINRA, Regulatory Notice 20-08, *Pandemic-Related Business Continuity Planning, Guidance and Regulatory Relief* (Mar. 9, 2020), <https://www.finra.org/rules-guidance/notices/20-08>.



In a world where so many people are transitioning to remote work on a more permanent basis and where firms are able to conduct supervisory processes remotely, the business expansion application requirement has become overly burdensome. We therefore ask that FINRA reconsider the business expansion requirement and IM-1011-01 in light of the widespread shift to, and growing acceptance of, remote working arrangements.

f. Gifts and Entertainment

Given the paradigm shift occurring in connection with client relationships, we believe FINRA should consider larger-scale updates with respect to the rules regarding gifts and entertainment, both in general and specifically in the context of virtual meetings.<sup>24</sup> COVID-19 has changed how firms do business and how they interact with customers. Customer relationships have become increasingly decentralized as virtual communication becomes the norm and firms move away from maintaining larger office spaces.<sup>25</sup> Additionally, customers are also leveraging new technology to interact with firms (email, text messages, and videoconference meetings) and many times meet in non-office type environments, such as a client's house or a restaurant. FINRA has provided some recent guidance regarding gifts and entertainment;<sup>26</sup> however, the guidance was limited in scope, and questions remain as to the application of these rules as a matter of practice. In 2016, FINRA conducted a retrospective review of these rules and came out with a broader proposal for more overarching updates to the rules regarding gifts, gratuities and non-cash compensation.<sup>27</sup> We support a broader reform approach and believe an opportunity remains to re-evaluate the landscape regarding these rules in respect of the recent changes to the general work environment and other items highlighted in this letter. As such, we request FINRA modernize rules regarding gifts and entertainment in respect of these considerations.

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<sup>24</sup> See FINRA Rule 3220.

<sup>25</sup> See Kelsi Maree Borland, *Office Tenants Are Leasing Much Less Space*, GlobeSt.com (Jan. 28, 2021), <https://www.globest.com/2021/01/28/office-tenants-are-leasing-much-less-space/?slreturn=20210031221934>; (“A survey of companies conducted by S&P Global Market Intelligence found that 64% of companies plan to keep remote work policies following the pandemic. As a result, 32% of companies plan to reduce their office footprint as a result....”).

<sup>26</sup> FINRA, *Gifts/Business Entertainment/Non-Cash Compensation FAQs*, <https://www.finra.org/rules-guidance/guidance/faqs/business-entertainment>.

<sup>27</sup> FINRA, Regulatory Notice 16-29, *FINRA Requests Comment on Proposed Amendments to Its Gifts, Gratuities and Non-Cash Compensation Rules* (Aug. 2016), <https://www.finra.org/rules-guidance/notices/16-29>.



g. Technology

The pandemic has highlighted opportunities to leverage technology in a more efficient manner to achieve FINRA's regulatory mandates. FINRA should consider how it and member firms could modernize certain aspects of their operations to implement modern technology, and how new technology may in turn impact FINRA's current regulatory frameworks, particularly in an increasingly remote/virtual work environment.<sup>28</sup> We appreciate the consideration FINRA has already taken in providing guidance in respect of the widespread adoption of different technologies.<sup>29</sup> There are numerous opportunities to revisit regulatory requirements to account for now-prevalent technology that would further enhance firms' ability to operate in an efficient manner.

As discussed above, firms have been trialing remote inspections during the pandemic with strong results. FINRA should consider how centralized electronic systems and video conferencing software can be used to enhance the inspection process and allow for remote inspections that satisfactorily address FINRA's key areas of focus.

We ask that FINRA consider permitting an electronic signature for Form U4 and Form U5 submissions. FINRA should look to capture the electronic signatures of registered persons through FINRA's FinPro Gateway, and the electronic signatures of firms through FINRA Gateway. Electronic signatures are widely accepted as legally enforceable where it complies with current legislation and would provide greater efficiency in several aspects of complying with regulatory requirements.<sup>30</sup>

The pandemic has also created an opportunity to modernize document delivery. Allowing electronic delivery of documents is consistent with the long-term trend in investors' preferences for digital communications and their reliance on digital interactions over traditional paper communications. Additionally, electronic delivery of documents provides an easier method for firms to keep and maintain records, without the hassle of dealing in paper. During the crisis, disruption of the U.S. Postal Service and international mail resulted in investors living abroad being unable to receive their regulatory documents by mail; instead, these investors are

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<sup>28</sup> FINRA is very experienced in leveraging technology in all of its program areas. *See* <https://www.finra.org/about/technology> (summarizing various FINRA technology initiatives); <https://www.finra.org/media-center/news-releases/2019/finra-launches-initiative-simplify-firms-digital-experience-finra>; <https://www.investmentnews.com/finra-tackles-critical-issue-in-assessing-impact-of-innovation-79377> (creation of Office of Financial Innovation).

<sup>29</sup> *See, e.g.,* FINRA, *Gifts/Business Entertainment/Non-Cash Compensation FAQs*, <https://www.finra.org/rules-guidance/guidance/faqs/business-entertainment>.

<sup>30</sup> *See* Electronic Signatures in Global and National Commerce (ESIGN) Act; *see also* Uniform Electronic Transactions Act.



dependent upon electronic delivery to receive important financial documentation. Regular mail was also subject to severe disruptions in the continental United States as the U.S. Postal Service addressed its own struggles with the pandemic, particularly during times of high volume.<sup>31</sup> Electronic document delivery could alleviate concerns regarding the delivery of important documents and provide an efficient, less costly method for firms to keep clients informed.

Although we have provided several areas that we believe are ripe for reconsideration, we encourage FINRA to contemplate in what ways technology may further impact existing regulatory frameworks.

#### h. Pandemic Playbook

COVID-19 came as a massive shock to everyone and abruptly forced major changes into our everyday lives. In order to ensure that we are all prepared for a potential future event, whether a pandemic or some other emergency situation that could have a similar widespread impact, we recommend that FINRA work with the industry to develop an overarching business continuity plan or “playbook” that would provide a road map to handle major disruptions. We envision such a playbook would be mutual and dynamic given that industry and regulators need to effectively work together during times of stress. The playbook could cover such topics as FINRA’s ability to issue relief and processes for how FINRA will work with other regulators to find common solutions. By clearly identifying roles to be played and developing an action plan, the playbook could unify the financial industry to improve coordination and information sharing across the sector to handle exigent circumstances. The playbook would allow FINRA and the industry to respond quickly and decisively to disruptive events with the benefit of knowledge and experience from lessons learned during COVID-19.

It may also be beneficial to develop a testing mechanism akin to SIFMA’s Quantum Dawn cybersecurity exercises to practice and improve coordination with key industry players and regulators in order to maintain market operations in the event of a major disruption.<sup>32</sup> Testing the playbook in such a manner would allow the industry to establish a better process to handle major disruptions in the future.

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<sup>31</sup> Paul P. Murphy, “Perfect storm” of high package volume, employees out with COVID slowing USPS deliveries before Christmas, CNN (Dec. 23, 2020), <https://www.cnn.com/2020/12/23/business/usps-delays-christmas-trnd/index.html>.

<sup>32</sup> See, e.g., *Cybersecurity Exercise: Quantum Dawn V*, <https://www.sifma.org/resources/general/cybersecurity-exercise-quantum-dawn-v/> (Quantum Dawn V was the most recent iteration of the cybersecurity program in 2019).



i. Effective Periods of Regulatory Relief

Much of the active temporary relief from FINRA is set to expire in March or April of 2021 absent further extension.<sup>33</sup> Given the current state of the COVID-19 pandemic, we ask that FINRA extend all currently available relief indefinitely. It is unclear how long pandemic conditions could persist or how long it will take to adjust to the impact the COVID-19 pandemic has had.<sup>34</sup> In consideration of the extension of relief, we also ask that FINRA consider making permanent certain relief, as discussed in this letter, that would provide ongoing benefits and efficiencies, even after the COVID-19 pandemic has ended.

Additionally, much of the regulatory relief provided by FINRA and other regulators is structured such that it requires continual renewal after a brief effective period.<sup>35</sup> We believe a better approach for regulators under these circumstances would be to provide relief without a set end date but with a notice that they will issue an additional notification when the relief will be set to expire, after which they will provide sufficient time for firms to come into compliance.<sup>36</sup> Particularly in light of the other challenges firms are currently facing, regulators need to provide early advance notice that they are considering sun-setting any available relief. Ongoing operational constraints will necessitate a long exit ramp for the expiration of relief during which firms may adjust their operations and achieve compliance. We believe this approach provides industry participants with the flexibility they need to operate during the pandemic and a level of certainty that regulatory relief upon which they are relying will not expire abruptly so that they

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<sup>33</sup> See *Temporary Amendments to FINRA Rules*, <https://www.finra.org/rules-guidance/key-topics/covid-19/temporary-amendments-to-finra-rules>.

<sup>34</sup> There is still uncertainty regarding the vaccine rollout and the currently available vaccines' efficacy against potential new strains of COVID-19 that have or may evolve. Apoorva Mandavilli and Roni Caryn Rabin, *C.D.C. Warns the New Virus Variant Could Fuel Huge Spikes in Covid-19 Cases*, N.Y. TIMES (Jan. 15, 2021), <https://www.nytimes.com/2021/01/15/health/covid-cdc-variant.html>; Robert Bollinger, M.D., M.P.H., and Stuart Ray, M.D., *A New Strain of Coronavirus: What You Should Know*, HOPKINSMEDICINE.ORG (Dec. 28, 2020), <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/a-new-strain-of-coronavirus-what-you-should-know>.

<sup>35</sup> See, e.g., FINRA, *Proposed Rule Change to Temporarily Amend Certain Timing, Method of Service and Other Procedural Requirements in FINRA Rules During the Outbreak of the Coronavirus Disease (COVID-19)*, SR-FINRA-2020-015, (May 8, 2020), available at <https://www.finra.org/sites/default/files/2020-05/SR-FINRA-2020-015.pdf> (as extended by [SR-FINRA-2020-017](#), [SR-FINRA-2020-022](#) and [SR-FINRA-2020-042](#)).

<sup>36</sup> We believe the relief provided by FINRA Regulatory Notice 20-08 and the latest SEC order regarding fingerprinting (as compared to the earlier issuances) are good examples of appropriately structured relief. See FINRA, *Regulatory Notice 20-08, Pandemic-Related Business Continuity Planning, Guidance and Regulatory Relief* (Mar. 9, 2020), <https://www.finra.org/rules-guidance/notices/20-08>; see also SEC, *Order under Section 17A and Section 36 of the Securities Exchange Act of 1934 Extending Temporary Exemptions from Specified Provisions of the Exchange Act And Certain Rules Thereunder*, Rel. No. 34-89170 (Jun. 26, 2020), available at <https://www.sec.gov/rules/exorders/2020/34-89170.pdf>.



can adequately prioritize their operations and focus on dealing with the ongoing challenges arising from the pandemic.

j. Coordination Among Regulators

SIFMA recognizes that many of the issues addressed in this letter will require coordination among federal and state regulators to develop viable solutions. We express our support for cooperation among regulators to develop a holistic regulatory approach that addresses the concerns highlighted by the pandemic. As detailed in this letter, we also see this as an opportunity to revisit regulatory requirements that may now be antiquated and to consider a framework that can be applied uniformly across the industry. In consideration of these issues, we ask that FINRA contemplate how any potential rule changes could become more uniform across regulators, both in terms of the timing of their effectiveness and the requirements themselves.

We greatly appreciate the efforts of FINRA, the SEC and NASAA in developing a regulatory response to the challenges presented by COVID-19 and keeping the industry apprised of ongoing developments. We believe continued regulatory coordination can serve only to benefit the industry's recovery from COVID-19 and to ensure that it comes out of the pandemic stronger and healthier than ever.

***II. Comments – Specific FINRA Questions***

In addition to the key areas highlighted in this letter, we respond below to some of the questions posed by FINRA in Regulatory Notice 20-42 with the original questions provided for convenience.

***Business Continuity Plans***

1. *What has been your experience with implementing Rule 4370 during the pandemic, including any ambiguities in the rule or challenges to comply with it?*

SIFMA members, for the most part, had few issues implementing Rule 4370 during the pandemic. Over the years, financial firms' dedication to building, testing and maintaining robust business continuity plans played a critical role in ensuring continued operations of the financial markets, even given significant volumes and volatility. With more than 90% of financial staff continuing to work remotely, there have been no major operational outages or failures that impacted the industry's ability to trade, clear and settle trades in a timely manner. The FINRA rules, therefore, are clear and concise and provide the right level of guidance around building effective business continuity plans as demonstrated during this extreme event.



In line with Rule 4370, SIFMA members “create and maintain written business continuity plans identifying procedures relating to an emergency or significant business disruptions.” In addition, financial firm business continuity plans are continually updated and tested in the event of “any material change to the member’s operations, structure, business or location.” Further, any changes to operations and technology infrastructure including “all mission-critical systems” applications and networks, that would have a material impact on critical processes, are also continually tested.

Financial firms “designate a member of senior management to approve the plan and he or she shall be responsible for conducting the required annual review,” which are typically signed off by the business unit head. In addition, firms conduct internal audits for their most critical processes, and the findings and deficiencies are reported to and monitored by the firm’s Senior Risk Committees and/or Board of Directors.

Firms use Rule 4370 as a foundation for their business continuity programs, and also include rules, regulations and guidance from regulatory bodies and central banks around the world, as well as ISO standards, IT Management frameworks such as COBIT and ITIL, best practices from the Disaster Recovery and Business Continuity Institutes and over 500 members of SIFMA’s BCP Committees, and Big 4 Benchmarks, as part of their BCP planning, preparation, testing, training and awareness processes.

As part of the business continuity planning process, firms conduct “financial and operational assessments” to determine the financial consequence of loss over time (FCOL) for critical business processes using Business Impact Analysis (BIA) and Risk Assessment (RA) tools that also assess physical, cyber, technology, natural disaster and geographic concentration risks for each critical location and those of their key third parties. The BIAs and RAs also cover “qualitative impacts to critical business constituent, bank, and counter-parties” as well as quantitative impacts around not meeting certain “regulatory reporting” requirements.

Financial firms do “*maintain alternate communications (channels) between customers and the member and between the member and its employees*” utilizing Emergency Notification systems such as Everbridge and third-party messaging applications such as WeChat and Slack, should primary communications channels be impacted during an extreme event. Post 9/11, many firms also continue to maintain access to customer and member personal email accounts (e.g., Yahoo, Gmail et al) for emergency communications purposes only.



With regard to “how the member will assure customers’ prompt access to their funds and securities in the event that the member determines that it is unable to continue its business” there are several programs and regulatory guidance in place today:

- *SIFMA’s Bulk Data Transfer Playbook* is a framework and guide for a carrying firm to leverage when executing a “bulk transfer” of all customer accounts and assets from a failing carrying firm to a viable carrying firm under a highly condensed timeline.
- *Sheltered Harbor*: Sheltered Harbor was created to protect customers, financial institutions, and public confidence in the financial system if a catastrophic event like a cyberattack causes critical systems—including backups—to fail. Implementing the Sheltered Harbor standard prepares institutions to provide customers timely access to retail banking balances and funds in such a worst-case scenario.
- *Living Wills/Recovery and Resolution Plans (RRPs)*: In addition to maintaining robust BCP Plans, many financial institutions subject to Section 165(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, must develop Living Wills or RRP’s which describe the company’s strategy for rapid and orderly financial recovery or resolution in the event of material financial distress or failure of the company.

*2. Should FINRA consider any amendments to Rule 4370 to address issues raised during the pandemic?*

The pandemic required many institutions to seek regulatory relief for critical trading, operations and other staff working from home using new tools and capabilities not covered under existing compliance and supervisory guidelines. As suggested in previous Sections of this letter, “*FINRA may consider that a better approach for regulators, under these circumstances, would be to provide relief without a set end date but with a notice that they will issue an additional notification when the relief will be set to expire, after which they will provide sufficient time for firms to come into compliance*”.

*3. Did your firm’s BCP plan directly or indirectly address the circumstances of the pandemic?*

Financial firm BCP plans both directly and indirectly addressed the circumstances of the pandemic. Financial firms develop pandemic plans which are separate and apart but closely linked to a firm’s BCP plans, which must work in tandem. For example, a firm’s pandemic plans are typically synchronized with World Health Organization (WHO) Phase declarations and Center for Disease Control (CDC) guidance and may suggest at what point in time BCP plans would be triggered.

Financial firm pandemic plans typically test the short-term loss of staff at different percentage levels (*e.g.*, 10%, 25% or 50%), while the BCP plans ensure the ability to work



remotely from home or backup locations in these situation. Financial firm BCP plans would also include the ability to shift processing of key processes to different geographies during a rolling pandemic (*i.e.*, a virus that begins in one geographic area and then spreads to others) which complicates Office of Supervisory Jurisdiction (OSJ) designations, especially if the process shifts to a work from home environment.

*4. Did your firm make or does your firm plan to make any changes to its BCP in response to the pandemic?*

During this pandemic, several unique issues arose that required additional attention likely requiring enhancement to financial firm BCP planning efforts:

- A typical BCP plan may not have accounted for the lockdowns that occurred in India, Malaysia and other countries where financial firms have key staff and/or third parties running critical processes that are required to be on-site to continue these functions. Resolving these issues required significant intervention between SIFMA, ASIFMA, the U.S. Treasury, DHS CISA, the State Department and National Governors Association to work with governments to ensure “essential employees” were appropriately designated and granted right-of-way access through police checkpoints to reach critical locations (*e.g.*, data centers, call centers, etc.).
- BCP plans may not have considered the speed at which COVID-19 spread around the world or the prospect of having to kick off BCP plans simultaneously in many locations around the world.
- Many plans may not have considered that working remotely would last a substantial period of time and requiring regulatory relief, especially for trading staff physically moving to other jurisdictions having different regulatory requirements.<sup>37</sup>
- Given the large number of operations and back office staff working remotely, in many cases, it became more difficult to retrieve and process investor checks and physical securities, especially those requiring medallion stamps and wet signatures. This may have delayed clearing and settling of some securities, but overall, the impact to investors was manageable. However, regulatory relief was needed and granted quickly working closely with our regulatory partners around the world.
- Given the large number of staff working remotely and the potential for localized power, telecommunications or outages impacting a large number of financial staff, firms have been adding “Reverse Recovery” strategies to their BCP planning

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<sup>37</sup> There is an effort in AsiaPac right now, led by ASIFMA, to work on the resulting regulatory fragmentation issues around compliance and supervision.



portfolio. Financial staff working remotely typically do not have emergency generators or backup telecommunications facilities. If there is a widespread loss of power due to storms, wildfires or other disruptive events or a “last mile” outage of an internet service provider (*e.g.*, Comcast), covering a large geographic area where financial staff operate, firms have implemented Reverse Recovery BCP plans which allow staff to rapidly move from home offices to primary or backup facilities having robust power and telecommunications infrastructures.

- With the pandemic and large number of staff working remotely, firms have had to implement new or place a higher reliance on secure chat/messaging, soft phones and video conferencing applications (*e.g.*, Zoom, WebEx, Signal, Jabber, etc.) and ensure they comply with regulatory requirements if used to communicate with clients, where applicable. The use of these applications has also required upgrades or segregation of “last mile” bandwidth, and in some cases, traffic prioritization mechanisms to ensure trade messages and market data take priority over normal administrative (*e.g.*, email) traffic.

*5. Does your firm annually test its BCP? If so, are there any changes to testing warranted given what your firm has learned during the pandemic?*

Plans for a firm’s most critical functions are tested at least annually and, in many cases, on a quarterly basis. This would include physically moving critical staff to “alternate physical locations” as well as work from home offices. The pandemic, however, placed significant constraints on firms’ ability to conduct their normal portfolio of business continuity plan testing. The pandemic, though, did provide an opportunity for virtually every function throughout the organization to stand up and implement their respective business continuity plans.

Many tabletop exercises around pandemics in the past may have focused on initial regional impacts which then ripple across the globe. Country lockdowns may not have been considered as a likely scenario. Further, given the fast and furious pace of this pandemic, which very quickly went global, firms had to adjust to the rate of spread. Going forward, these scenarios and the many lessons learned will likely be included in future tabletop exercises.

Over time, there has been closer coordination between the firms’ BCP planners and IT and Cyber Incident Response teams to test extreme cyber scenarios to ensure operational resilience. Many cyber-related scenarios impacting business continuity planning have been previously tested during SIFMA’s Quantum Dawn and U.S. Treasury’s Hamilton series of exercises over the past several years. Given the recent surge in phishing and other cyber-attacks now targeting financial staff working from home, financial firms are adjusting their testing



portfolios to ensure remote office resilience as well as the confidentiality, integrity, availability and privacy of data in remote working environments.

### *III. Conclusion*

COVID-19 has had a considerable impact on the way we live and the way we do business. The pandemic has emphasized the need for regulatory change in many areas and provided the opportunity to reevaluate the way we operate going forward. In light of the changed and still-changing industry landscape, we ask that FINRA consider the concerns and potential solutions addressed herein and seize the opportunity to create a better system for all parties involved. As the pandemic stretches on and further issues arise, we will continue to gather critical data and insights to inform and expand the initial lessons and considerations highlighted in this letter.

We wish for the continued health and safety of FINRA and its staff.

Very truly yours,

A handwritten signature in black ink, appearing to read "K. Zambrowicz", is written over a light gray circular stamp. The signature is fluid and cursive.

Kevin Zambrowicz  
*Managing Director & Associate General Counsel*