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December 22, 2021

Via e-mail to rule-comments@sec.gov

U.S. Securities and Exchange Commission
100 F Street, NE
Washington DC 20549-1090
Attn: Ms. Vanessa A. Countryman

Re: Electronic Recordkeeping Requirements for Broker-Dealers, Security-Based Swap Dealers, and Major Security-Based Swap Participants (Release No. 34-93614; File No. S7-19-2)

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ welcomes the opportunity to comment on the Securities and Exchange Commission’s (“Commission”) proposed amendments to the electronic recordkeeping and prompt production of records requirements applicable to broker-dealers, security-based swap dealers (“SBSDs”), and major security-based swap participants (“MSBSPs” and, collectively with broker-dealers and SBSDs, “Regulated Entities”).² SIFMA and its members applaud the Commission’s efforts to modernize the recordkeeping requirements applicable to Regulated Entities. SIFMA also appreciates the Commission’s engagement with technology providers and the financial industry to understand the challenges and opportunities that evolving technologies create for Regulated Entities and their customers as well as technology providers.³

Please note that given the extremely short 30-day comment period, we have chosen to focus on a narrow set of topics in this letter. We simply did not have sufficient time to conduct the more in-depth analysis required to answer the specific questions included in the Proposed Rules as the comment period was short and also fell over several holiday periods, thus allowing only three weeks to receive member feedback. We hope the Commission will provide a longer comment period for future rulemakings to allow the public to provide more robust feedback. With that said, SIFMA has proposed the following changes to further our shared goal of modernizing the recordkeeping requirements applicable to Regulated Entities.

¹ 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 members, 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”).

² Electronic Recordkeeping Requirements for Broker-Dealers, Security-Based Swap Dealers, and Major Security-Based Swap Participants, 86 FR 68300 (proposed Dec. 1, 2021) (to be codified at 17 C.F.R. pt. 240) (“Proposed Rules”).

³ SIFMA would like to thank Chris Salter, Derek Manners, and Elena Aguirre of Allen & Overy for their assistance with drafting this letter and ongoing support on this issue.



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I. The third-party recordkeeping undertaking should be deleted.

SIFMA recommends that the Commission deletes the third-party recordkeeping undertaking in Rule 17a-4(i) and corresponding Rule 18a-6(f). SIFMA proposes this change for two reasons.

First, cloud service providers do not have the ability to make the representation outlined in Rules 17a-4(i) and 18a-6(f). Since cloud storage is similar to storing the records in-house with respect to who can access the records, it is generally not possible for a third-party provider to produce any records in an electronic format (much less a “hard copy”) given that such files are often encrypted and accessible only by the Regulated Entity. Moreover, if cloud storage providers were to create a mechanism that granted them access, this would undermine the cybersecurity protections offered by cloud storage. These concerns have led to the refusal of cloud storage providers, such as Microsoft and Amazon, to create such a mechanism and provide the letter of undertaking. Thus, maintaining the requirement for such third-party attestations undercuts the intended goal of modernizing the electronic recordkeeping requirements.⁴

Second, we question the continued value of Rules 17a-4(i) and 18a-6(f) given the new senior officer undertaking in the Proposed Rules as well as existing recordkeeping requirements applicable to Regulated Entities. In particular, the new senior officer undertaking requires the people who actually have the requisite ability to provide such records (*i.e.*, the senior officers) to make the undertaking. Given that under the Proposed Rules, both the Regulated Entity and the individual officers will have an obligation to provide records requested by regulators, there is no need to maintain the third-party recordkeeper undertaking, particularly when doing so will frustrate the Commission’s goal of making the recordkeeping rules more technologically neutral as described in the previous paragraph.⁵

II. The term “senior officer” in the Proposed Rules should be distinguished from the definitions of senior officer applicable to SBSs and MSBSPs.

SIFMA recommends that the use of the term “senior officer” in 17a-4(f)(3)(vii) and 18a-6(e)(3)(vii) of the Proposed Rules be changed to “designated officers.” This change is proposed because the term “senior officer” has different definitions in the SBS and MSBSP (each an “**SBS Entity**”) context. The terms “a senior officer” and “the senior officer” are used in different SBS Entity regulations, each with specific enumerated responsibilities.⁶ This change would make it clear that the people making the undertaking in 17a-4(f)(3)(vii) and 18a-6(e)(3)(vii) are not necessarily the same person as the “senior officer” contemplated in the existing SBS Entity regulatory context.

III. Regulated Entities should be able to designate more than one designated officer to complete the undertaking in 17a-4(f)(3)(vii) and 18a-6(e)(3)(vii) of the Proposed Rules.

The Proposed Rules state that a broker-dealer must have “at least one senior officer” with independent access to and the ability to provide records who can execute the required undertakings.⁷ SIFMA

⁴ See, e.g., Proposed Rules at 68316 (“The proposed amendments are intended to modernize the SBS Entity and broker-dealer recordkeeping rules given technological changes over the last two decades.”).

⁵ See, e.g., Proposed Rules at 68301 (“Finally, the amendments to both rules would remove or replace text to make them more technology neutral and to improve readability.”).

⁶ See 17 CFR § 240.15Fb2-1; § 240.15Fk-1.

⁷ Proposed Rules at 68311.



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understands this to mean that more than one person can make the undertaking required in 17a-4(f)(3)(vii) and 18a-6(e)(3)(vii) of the Proposed Rules. However, this intended meaning is not clear from the proposed text of 17a-4(f)(3)(vii) and 18a-6(e)(3)(vii). As a result, SIFMA suggests clarifying that more than one person may make the undertaking.

In particular, as currently drafted, the term “senior officer” could be interpreted as limiting the designation to a single officer who must independently access and provide records maintained and preserved by the Regulated Entity, which is overly restrictive and would be impractical for many larger organizations that may use a variety of forms of electronic recordkeeping. Changing the term to “designated officers” would make it clear that multiple people may make the undertaking as long as, taken together, such undertakings cover all means of electronic recordkeeping used by a Regulated Entity.

IV. Similarly, the requirement for the senior officer to have independent access should be modified to allow for designation of responsibility.

The inclusion of the requirement for the senior officer to have “independent access” in 17a-4(f)(3)(vii) and 18a-6(e)(3)(vii) of the Proposed Rules implies that the individual or individuals will have every password as well as personal knowledge of every repository that may hold records of the Regulated Entity. This is an unrealistic expectation of a senior person in a large organization. As a result, SIFMA proposes that the individual or individuals who provide the undertaking will have accountability for providing the records, but not necessarily direct individual access to the required records. Thus, SIFMA proposes that “independent access” in 17a-4(f)(3)(vii) and 18a-6(e)(3)(vii) be changed to “been designated as responsible for providing.”

V. The audit trail requirement in the Proposed Rules that a Regulated Entity be able to reproduce every iteration of a record should be changed to track the language in 21 CFR 11.10 cited in footnote 57 of the Proposed Rules.

While it is generally possible to produce a log showing who has made specific changes at a specific time, it may not always be possible for the means of electronic recordkeeping to reproduce every version of a record that has undergone changes at multiple points in time. Instead, some repositories will only have the current version of the record, along with a log of all changes made during the required retention period. While the current version of a record, along with a log of all changes that have been made to that record, would permit the manual recreation of the record as it appeared at any given point in time, the electronic tool may not be able to automatically generate such a record.

SIFMA believes that the requirement to be able to reproduce every version of a record rather than a log of all changes made to a record will limit Regulated Entities’ use of the newly proposed means of electronic recordkeeping. Moreover, the provision of a log of all changes along with the current version of a record will enable the Regulated Entity and/or a regulator to determine what the record contained on any particular date and at any particular time, and who made relevant changes. Thus, in order for the audit trail to remain technologically neutral, SIFMA recommends that the language in 17a-4(f)(2)(i)(A)(4) and 18a-6(e)(2)(i)(A)(4) of the Proposed Rules that provides “and will permit re-creation of the original record and interim iterations of the record” be changed to “such that record changes shall not obscure previously recorded information” to track the language in 21 CFR 11.10 cited in footnote 57 of the Proposed Rules. We believe that this would achieve the Commission’s objective of ensuring that electronic records are maintained and preserved in a manner that protects the authenticity and reliability of original records



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without undermining the Commission’s goal of making the recordkeeping rules more technologically neutral.⁸

VI. The requirements in 17a-4(f)(3)(v) and 18a-6(e)(3)(v) of the Proposed Rules should be deleted.

As discussed in more detail below, SIFMA is concerned that the addition of many of the same technical requirements in 17a-4(f)(3)(v) and 18a-6(e)(3)(v) of the Proposed Rules needed to maintain an audit trail to all means of electronic recordkeeping may also require that records stored in a WORM environment need to undergo technical changes to comply with the Proposed Rules. Similarly, we believe 18a-6(e)(3)(v) imposes technical requirements on bank SBS Entities, which we understand was not the intent of the Proposed Rules. As a result, SIFMA recommends that 17a-4(f)(3)(v) and 18a-6(e)(3)(v) be deleted due to these concerns. In the alternative, if the Commission does not delete 18a-6(e)(3)(v), we recommend that it be amended to exclude bank SBS Entities from having to impose the new technical requirements included in the Proposed Rules on their means of electronic recordkeeping.

A. The requirements in 17a-4(f)(3)(v)(A) and 18a-6(e)(3)(v)(A) are nearly identical to the technical requirements of the audit trail.

For ease of comparison, we have put the technical requirements in 17a-4(f)(3)(v)(A) and 18a-6(e)(3)(v)(A) applicable to all means of electronic recordkeeping side-by-side with the related technical requirements of the audit trail in 17a-4(f)(2)(i)(A) and 18a-6(e)(2)(i)(A) in the table below. These requirements are substantively identical.

Technical requirements for all means of electronic recordkeeping in 17a-4(f)(3)(v)(A) and 18a-6(e)(3)(v)(A)	Technical requirements for the audit trail in 17a-4(f)(2)(i)(A) and 18a-6(e)(2)(i)(A)
Have in place an auditable system of controls that records, among other things:	Preserve the records for the duration of their applicable retention periods in a manner that maintains a complete time-stamped audit trail that includes:
(1) Each input, alteration, or deletion of a record;	(1) All modifications to and deletions of a record or any part thereof
(2) The names of individuals inputting, altering, or deleting a record; and	(3) The individual(s) creating, modifying, or deleting the record;
(3) The date and time such individuals input, altered, or deleted the record.	(2) The date and time of operator entries and actions that create, modify, or delete the record;

B. 17a-4(f)(3)(v) and 18a-6(e)(3)(v) should be deleted to avoid imposing the technical requirements of the new audit trail alternative on existing WORM solutions.

Under the Proposed Rules, 17a-4(f)(3)(v) and 18a-6(e)(3)(v) apply to all Regulated Entities that use any means of electronic recordkeeping, which includes both WORM and audit trail solutions. However, by imposing many of the same technical requirements needed to maintain the proposed audit trail alternative

⁸ Proposed Rules at 68307 (“The objective is to require these registrants to maintain and preserve electronic records in a manner that protects the authenticity and reliability of original records.”).



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to any means of electronic recordkeeping, we are concerned that the Proposed Rules will require WORM solutions to also have the technical requirements of the proposed audit trail alternative, which they may not currently have the ability to do. In particular, because records stored in a WORM environment cannot be altered, we are concerned that it will not be clear, for example, how firms can have in place an auditable system of controls that records alterations to immutable records. With that said, due to the limited amount of time we have had to consider this point, we have not been able to determine whether Regulated Entities could continue to use WORM while meeting these new technical requirements.

Our understanding is that the Commission’s intent was to provide firms with the optionality to choose between means of electronic recordkeeping that utilize the new audit trail alternative or existing WORM solutions.⁹ However, by imposing the technical requirements of the proposed audit trail alternative to WORM solutions, we are concerned that the Proposed Rules, as currently drafted, may not achieve that goal. As a result, our recommendation is to delete 17a-4(f)(3)(v) and 18a-6(e)(3)(v). We would welcome the opportunity to discuss this matter further with the Commission and the Staff.

C. In the alternative, bank SBS Entities should be carved out from the technical requirements in 18a-6(e)(3)(v).

If the Commission maintains the technical requirements in 18a-6(e)(3)(v), such requirements should not apply to bank SBS Entities. We understand from the Proposed Rules that the Commission did not intend for 18a-6(e)(3) to apply any new technical requirements on the means of electronic recordkeeping utilized by bank SBS Entities. Specifically, the Proposed Rules state: “Paragraph (e)(3) of Rule 18a–6 does not impose technical requirements on the electronic recordkeeping system.”¹⁰ Instead, such technical requirements were intended only to apply to non-bank SBS Entities as set out in 18a-6(e)(2).¹¹ The Commission stated that this was because, “the proposal to amend the requirements for electronic recordkeeping systems in paragraph (e)(2) of Rule 18a–6 to add the audit-trail and WORM alternative requirements could impose requirements that conflict with regulations or guidance of the prudential regulators.”¹²

While we understand that the Commission has indicated that it does not believe that 18a-6(e)(3) imposes such technical requirements and, therefore, bank SBS Entities should be subject to 18a-6(e)(3), SIFMA believes that, as proposed, 18a-6(e)(3)(v) does impose on bank SBS Entities many of the same technical requirements to maintain an audit trail that apply to non-bank SBS Entities under 18a-6(e)(2) as set out in Section VI.A above.

⁹ See, e.g., Proposed Rules at 3806 (“Under the proposed amendments, broker-dealers could potentially continue to use the electronic recordkeeping systems they currently employ to meet the WORM requirement. Similarly, nonbank SBS Entities would have the option to use electronic recordkeeping systems that meet the WORM requirement (as an alternative to the audit-trail requirement). For example, WORM-compliant electronic recordkeeping systems may be appropriate for storing certain types of records such as emails (as compared to transaction and ledger account data that is updated continuously). Moreover, some broker-dealers may choose to use their existing WORM-compliant electronic recordkeeping systems rather than adopt a new technology.”).

¹⁰ Proposed Rules at 68307.

¹¹ The Proposed Rules state: “However, the Commission is proposing to limit the application of the requirements for electronic recordkeeping systems in paragraph (e)(2) of Rule 18a–6 to nonbank SBS Entities, that is, SBS Entities without a prudential regulator. SBS Entities with a prudential regulator (‘bank SBS Entities’) would therefore not be subject to the requirements of paragraph (e)(2) of Rule 18a–6, as proposed to be amended.” Proposed Rules at 68304.

¹² Proposed Rules at 68305.



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As a result, SIFMA believes that if 18a-6(e)(3)(v) is not deleted, there should be a carve out for bank SBS Entities in order for the Commission to achieve its stated goal of not imposing technical requirements on bank SBS Entities' means of electronic recordkeeping.

VII. The Proposed Rules contain some terms that should be altered to further the objective of keeping the rules technologically neutral.

There are a number of terms included in the Proposed Rules that SIFMA believes may inhibit the potential of the Proposed Rules to be technologically neutral over time. As discussed in further detail below, these terms include: (i) “produced or reproduced;” (ii) “electronic recordkeeping system;” (iii) “computer;” (iv) “backup electronic recordkeeping system;” and (v) “download.”

1. The Proposed Rules maintain the phrase “produced or reproduced” in 17a-4(f) and 18a-6(e). One of the goals of the Proposed Rules is to allow Regulated Entities to have a unified set of business records and regulatory records whereas this language suggests that such records are separate. SIFMA would recommend using the word “retained” in place of “produced or reproduced.”¹³
2. The Proposed Rules use the term “electronic storage system” instead of the term “electronic recordkeeping system” used in the current rules. SIFMA recommends deleting the word system, and instead use the phrase “electronic recordkeeping,” which would eliminate the concept of “system” throughout 17a-4(f) and 18a-6(e). The use of the word “system” complicates the meaning of the provisions, as it implies the expectation of a physical and specified grouping of hardware and software rather than a system of supervision undertaken by a Regulated Entity to ensure records are maintained.
3. If, however, the term “electronic recordkeeping system” is retained, SIFMA recommends altering the definition to eliminate the word “computer,” which may not be technologically neutral in the future.
4. SIFMA also recommends that the requirement for a backup electronic recordkeeping system in 17a-4(f)(3)(iii) and 18a-6(e)(3)(iii) be eliminated and instead require that the means of electronic recordkeeping have fail-safes in place to ensure that records are accessible at all times, including during an emergency or at a time of significant business disruption. The requirement to maintain a separate backup system is not technologically neutral, as there are currently other alternatives available to ensure redundancy with respect to records in times of stress. Further, the requirement undermines one of the central goals of the Proposed Rules to permit Regulated Entities to have a unified set of business records and regulatory records.
5. Finally, SIFMA would propose changing the word “download” to “retrieve” to make the language more technologically neutral.

¹³ Proposed Rules at 38605 (“The audit-trail alternative would be designed to address concerns that the WORM requirement causes some firms to deploy an electronic recordkeeping system that serves no purpose other than to hold records in a manner that meets the Commission’s regulatory requirements for electronic recordkeeping systems.”).



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VIII. Regulated Entities should be given 18 months to comply with the amended rules.

Even if all of the proposed changes we have requested are accepted, we believe that Regulated Entities should be given 18 months to comply with the amended rules. This will give Regulated Entities time to develop, implement, and test changes that they believe will be necessary to comply with the amended rules. This is particularly acute for non-bank SBS Entities given that they will now have to comply with either an audit trail or WORM requirement for the first time.

IX. Conclusion

SIFMA appreciates the opportunity to provide these comments. SIFMA believes that the recommended changes above will make the proposed amendments to the recordkeeping requirements for Regulated Entities more technologically neutral, and thus contribute to the rules' longevity.

We will follow-up shortly to set up a meeting with the Commission staff to discuss our recommendations. If you have any questions, I can be reached at mmacgregor@sifma.org.

Sincerely,

Melissa MacGregor

Melissa MacGregor
Managing Director and Associate General Counsel

cc: Chair Gary Gensler
Commissioner Hester M. Peirce
Commissioner Elad L. Roisman
Commissioner Allison Herren Lee
Commissioner Caroline A. Crenshaw
Michael Macchiaroli, Associate Director, Division of Trading and Markets
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