



June 28, 2021

VIA ELECTRONIC SUBMISSION

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

Re: Regulatory Notice 21-17: Supporting Diversity and Inclusion in the Broker-Dealer Industry

Dear Ms. Mitchell:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to provide comments on Regulatory Notice 21-17² (the “Notice”) and how the Financial Industry Regulatory Authority’s (“FINRA”) rules, operations, and administrative processes may create unintended barriers to greater diversity and inclusion in the broker-dealer industry or that might have unintended disparate impacts on those within the industry. Below, we detail SIFMA’s own efforts to achieve greater diversity, equity, and inclusion (“DEI”) within the securities industry, followed by comments responsive to the Notice where FINRA could foster greater DEI by accounting for post-COVID-19 pandemic remote opportunities and scrutinizing whether certain disclosures, disqualifications, and margin and net capital rules disproportionately impact underrepresented individuals and smaller, diversity-owned firms.

I. SIFMA’s Commitment to DEI

Like FINRA, we are committed to DEI for individuals working or seeking opportunities in the securities industry. As I said to Congress, our industry:

has long recognized that building and maintaining a diverse and inclusive workforce that reflects the diversity of the clients and communities we serve is both the right thing to do

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 industry’s nearly one 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. With offices in New York and Washington, D.C., SIFMA is the U.S. regional member of the Global Financial Markets Association (GFMA).

² FINRA RN 21-17 (Apr. 29, 2021), <https://www.finra.org/rules-guidance/notices/21-17>.

and a business imperative. Likewise, our industry recognizes that a workforce that is diverse in demographics, experiences, talents, and ideas is the most effective way to cultivate varied perspectives that benefit our employees, the clients we serve, and the economy as a whole. Research has shown that companies with diverse employment perform better financially and are more successful. This does not come as a surprise given an inclusive environment allows for greater collaboration and innovation.³

SIFMA is engaged on several efforts to promote DEI in our industry. Below are some of our initiatives that we highlight not only to demonstrate our commitment to advancing this goal, but also to raise awareness of opportunities available to individuals.⁴

A. Diversity & Inclusion Advisory Council

SIFMA established a Diversity & Inclusion Advisory Council (“D&I Council”) that reports directly to the SIFMA Board of Directors. The D&I Council, whose membership includes senior DEI leaders at our member firms, provides an open and honest forum that allows our members the opportunity to discuss their unique initiatives and to benchmark with their peers on ways to achieve their DEI goals. The D&I Council currently has subcommittees supporting and driving forward action programs that can be benchmarked by member firms for metrics and measurement, training, business opportunities, talent acquisition, leadership development, and community outreach and engagement.

B. Biennial D&I Survey

Biennially, SIFMA facilitates a thorough benchmarking survey examining demographics, DEI programs, and industry practices of our member firms. This survey, conducted on a confidential basis, allows our members to assess their firm’s DEI initiatives and how their progress compares to the results of their peers. The survey also gives our members the opportunity to actively engage in discussions about where the industry stands and to look prospectively at the strong policies and practices needed to achieve our future goals. The D&I Council is in the planning stages of the 2022 survey.

C. Thought Leadership

SIFMA has invested significant effort in producing thought leadership content on DEI, launching a podcast series exploring metrics, recruitment, and culture, and publishing a blog series in recognition of Black History Month featuring member firm initiatives and Women’s History Month featuring SIFMA’s female Board members. The Biennial D&I Survey data, compiled into an executive report, also provides a key contribution to DEI thought leadership within the industry.

³ Kenneth E. Bentsen, Jr., Written Testimony Before the U.S. H.R. Comm. on Fin. Serv., Subcomm. on Diversity and Inclusion Hearing, “A Review of Diversity and Inclusion at America’s Large Banks” (Feb. 12, 2020), <https://www.sifma.org/wp-content/uploads/2020/02/KEB-Testimony-DI-Subcommittee-Hearing.pdf>.

⁴ For more and the latest information on our efforts, please visit: <https://www.sifma.org/explore-issues/diversity-and-inclusion/>.

D. Conferences & Events

For several years now, SIFMA has included DEI programming in our conferences, roundtables, and symposiums. For example, the SIFMA-Wharton Securities Industry Institute (“SII”) incorporated various DEI issues into its Year 1, 2, and 3 programming. These events include participation from the Directors of the Offices of Minority and Women Inclusion (OMWI) at the Securities and Exchange Commission (“SEC”) and other regulators as well as senior industry leaders, allowing for greater collaboration between our members and their primary regulators. Just recently, we held our successful Diversity, Equity & Inclusion Leadership Summit that brought together business executives from every facet of the capital markets to broadly understand how DEI shapes today’s workforce and plays a role in how our members serve their clients.

E. SIFMA Invest!

To build the pipeline for diverse talent, SIFMA, in partnership with our members and FINRA, this year launched SIFMA Invest!, a program that offers students enrolled at Historically Black Colleges and Universities (“HBCUs”) and minority-serving institutions a myriad of educational and career coaching opportunities for those interested in pursuing a career in financial services. SIFMA Invest! clubs set up at participating schools provide students with educational resources, opportunities to prepare for and take the Securities Industry Essentials (“SIE”) Exam, internship opportunities with SIFMA member firms, and resume reviews. Texas Southern University was the first school to launch, and we are currently looking to expand to Howard University, Florida A&M University, and Spelman College and others.

II. Opportunities for, or Barriers to, Greater DEI in FINRA’s Rules, Operations, and Administrative Processes

SIFMA appreciates FINRA’s efforts to date to foster greater DEI in the securities industry, including developing the SIE Exam and recently filing a rule change to permit individuals who leave the industry to maintain their qualifications for up to five years by completing continuing education (“CE”).⁵ These developments lower the barrier for individuals to enter or reenter the industry. In the past, an individual interested in working in the industry had to be affiliated with a broker-dealer before taking the necessary tests to be registered as a securities professional with FINRA. The SIE Exam allows unaffiliated individuals to enhance their resume by demonstrating their knowledge of the industry to prospective employers. In addition, the ability to keep abreast of industry developments without having to retake a qualification exam may significantly lower some of the potential reentry barriers for individuals who have left the industry due to extenuating personal and professional life events, like raising a family, caring for a sick family member, pursuing additional education, or losing a job during an economic downturn.

⁵ Proposed Rule Change to Amend FINRA Rules 1210 (Registration Requirements) and 1240 (Continuing Education Requirements), SR-FINRA-2021-015 (June 3, 2021), <https://www.finra.org/sites/default/files/2021-06/sr-finra-2021-015.pdf>.

We have identified other areas below where FINRA could enhance, or address impediments to, its efforts to foster greater DEI in the securities industry.

A. Expanding Remote Testing Options

In the early days of the pandemic during lockdowns, FINRA and its vendor, Prometric, were unable to offer traditional, in-person licensing exams, which created a backlog of thousands of individuals ready to sit for their qualification exams. FINRA and Prometric met the challenge by rolling out limited remote testing. A few of SIFMA's members took the lead and served as beta participants to provide input into the optimal end state process. Remote testing worked well and FINRA should seriously consider making it a permanent option.⁶ It provides flexibility and could be a better option for some individuals. Naturally, uniformity among stakeholders would serve individuals best seeking to take a FINRA representative or state exams.

B. Providing for Remote Work Arrangements

FINRA could foster greater DEI in the industry by updating its supervisory regime to account for remote work that has been spurred on by the COVID-19 pandemic. As we explained in our response⁷ to FINRA's request for comment on lessons learned from the pandemic, FINRA should seize this opportunity to update its outdated supervisory framework that has been based on physical work locations and in-person office inspections. Investments by our members and quantum leaps in technology provide the equivalent or even more advanced ability for firms to supervise the activities of individuals working remotely. This fosters greater DEI by providing flexibility and mobility for individuals not only seeking to better manage their work and personal lives but also those for whom remote work is the only viable option. This includes, for example, individuals with primary family care responsibilities, individuals with physical or mental health disabilities who have been experiencing an unprecedented level of accessibility in their employment due to the pandemic, and individuals who are excluded from job opportunities because they cannot afford to live within commuting distance of a job.

C. Effect of Financial and Non-Conviction Criminal Disclosures

FINRA's By-Laws and rules and the federal securities laws require an individual registering to be associated with a broker-dealer to disclose certain financial distress events (bankruptcies, compromises with creditors, judgments, and liens) and criminal charges. In turn, these disclosures may, with FINRA's discretion, appear on BrokerCheck, the database that

⁶ Special attention, however, need to be paid to the technology used and how the exams are administered to avoid noted discriminatory effects on underrepresented groups. *See, e.g.,* Patrick Grother et al., *Face Recognition Vendor Test*, Nat'l Inst. of Standards and Tech. (Dec. 2009), https://nvlpubs.nist.gov/nistpubs/ir/2019/NIST_IR.8280.pdf (finding that almost 200 face recognition algorithms had worse performance on nonwhite faces); *see also*, Shea Swauger, *Remote testing monitored by AI is failing the students forced to undergo it*, THOUGHT EXPERIMENT (Nov. 7, 2020), <https://www.nbcnews.com/think/opinion/remote-testing-monitored-ai-failing-students-forced-undergo-it-ncna1246769>.

⁷ Letter from Kevin Zambrowicz, Managing Director & Associate General Counsel, SIFMA, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA re: RN 20-42 (Feb. 16, 2021), <https://www.finra.org/rules-guidance/notices/20-42#comments>.

allows the public to research the background and experience of their financial brokers and advisers. Our members have observed the negative impact that these disclosures have on underrepresented individuals. It would serve the industry and the public well to further study and reconsider the collection of this information and whether these disclosures continue to serve their original purpose of investor protection.

1. Financial Distress Disclosures

Studies show that underrepresented groups are more likely to have bankruptcies, compromises with creditors, judgments, and/or liens.⁸ Our members have reported to us the impact of recruiting and retaining underrepresented individuals with financial distress events related to child support, death, divorce, illness, student loans, taxes, and so on. These disclosures can not only deter clients and employers, but also ensnare underrepresented individuals in FINRA enforcement actions, particularly for judgments and liens that are often enforced by creditors in a confusing way. Failure to disclose such events or to provide an update to the underlying disclosure usually results in enforcement action by FINRA, including a fine and suspension, and potentially disqualification from the industry for a willful violation. These individuals not only must cope with the psychological toll of the outstanding debt, but they are also oftentimes subject to a confusing process where, for example, creditors file multiple judgements and liens related to the original debt, which may result in a failure to disclose a judgment or lien or update thereto.

We would encourage FINRA to conduct an analysis (based on demographic data presently available to it) whether its enforcement actions based on financial disclosure failures disproportionately affect underrepresented groups. If FINRA's analysis finds a disparate impact, it would be worthwhile to reconsider whether the original justification for these disclosures holds true, or if de minimis thresholds for certain disclosures makes more sense. Although the justification for these disclosures lies in investor protection concerns – the ability to manage one's finances is important to investors, for example, these events are oftentimes caused by circumstances outside the control of the individual and not because of financial mismanagement. At the very least, FINRA should conduct outreach to these groups on the importance of disclosures, provide or direct them to guidance on the process for enforcing debt by creditors, and/or consider putting greater weight on mitigating factors when assessing whether to initiate an enforcement action or impose a penalty. A career-ending enforcement action and additional debt from the penalty is a significant barrier to entry or reentry for individuals from underrepresented groups.

⁸ See, e.g., Bina Patel Shrimali, The Fed. Rsv. Bank of S.F. et al., *At What Cost? Student Loan Debt in the Bay Area*, 1 (Apr. 2019), <https://www.frbsf.org/community-development/files/student-loan-debt-in-the-bay-area.pdf> (“Borrowers in low-income neighborhoods experience higher rates of delinquency and default.”); Paul Kiel & Hannah Fresques, *Data Analysis: Bankruptcy and Race in America*, Too Broke for Bankruptcy, (Sep. 27, 2017), <https://projects.propublica.org/graphics/bankruptcy-data-analysis> (“Black debtors are less likely to reach discharge than white debtors, even at the same income level.”).

2. Non-Conviction Disclosures

We would also encourage FINRA to examine whether the public disclosure of registered individuals' non-convictions, including acquittals and dropped charges, disparately impact underrepresented individuals, which experience disproportionately higher rates of arrest without conviction.⁹ The Form U4 requires the disclosure of all felony charges as well as charges for enumerated misdemeanors involving theft or breach of trust. Individuals are also required to provide timely updates, including the disposition of a criminal charge, which is then reported on BrokerCheck.

Such disclosures may create an inference of wrongdoing for individuals who have never been convicted of a crime. Once disclosed, a non-conviction can trigger additional reviews by state-level regulatory bodies that receive Form U4 information and which may view these non-convictions through a different lens than FINRA. While we agree that it is necessary for FINRA to have timely information on criminal events, including charges, we believe that the disclosure of non-convictions is not necessary to serve investor protection interests, and this practice disproportionately harms underrepresented individuals. We would encourage FINRA to exercise its discretion and eliminate non-conviction disclosures from BrokerCheck, which would positively impact the industry's diversity goals.

In addition, FINRA may also wish to examine whether it is appropriate to apply heightened supervisory procedures to associated persons who have never been convicted of a crime, such as circumstances involving acquittals, dismissals, and dropped charges.

D. Statutory Disqualifications

Further study and reconsideration should also be given to whether certain criminal convictions should disqualify individuals from the industry, effectively blocking the pipeline of young and diverse talent from building a career in the industry. Individuals who are convicted of any felony as well as enumerated misdemeanors in the last ten years are subject to statutory disqualification and cannot work in the industry.¹⁰ Although a firm can sponsor an individual in a FINRA eligibility proceeding to gain approval (ultimately from the SEC) to work in the industry notwithstanding a disqualification, the proceeding is expensive, laborious, and time-consuming. Approved individuals also require supervision above and beyond a firm's existing heightened supervisory procedures. Therefore, most firms choose not to hire disqualified individuals.

Eliminating certain convictions, curtailing the length a disqualification lasts, or limiting disqualifications to investment-related convictions requires an act of Congress to amend the Exchange Act, but FINRA (and the SEC) could lend its support, particularly for eliminating disqualifications for non-investment-related offenses. There is growing recognition of the increasingly well-documented inequalities in the economic and criminal justice system. The vast

⁹ Benjamin D. Geffen, *The Collateral Consequences of Acquittal: Employment Discrimination on the Basis of Arrests Without Convictions*, 20 U. PA. J. L. & SOC. CHANGE 81, 83 (2017), <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1206&context=jllasc>.

¹⁰ Exchange Act § 3(a)(39).

majority of offenses, particularly non-investment-related ones, are poor proxies for whether a person will be a diligent and honest member of the securities industry. We would encourage FINRA to consider whether it could support amendments to the Exchange Act or, at the very least, changes to the conditions for approval via an eligibility proceeding to make it less burdensome for firms to employ an individual subject to a non-investment-related disqualification and provide them an opportunity to have a successful career in the industry.

E. Margin and Net Capital Requirements' Impact on Diversity Firms

Lastly, our members have identified certain FINRA and SEC rules that disproportionately affect smaller firms, which include minority-, women-, and veteran-owned broker-dealers (“MWVBDs”), constraining their ability to participate in opportunities that would grow their business. We offer three examples of rules related to regulatory capital that disproportionately affect MWVBDs:

- The net capital treatment of certain types of transactions under FINRA Rule 4210 limits the ability of smaller firms to participate, for example, making it difficult for MWVBDs to underwrite forward or delayed delivery securities. In some instances, this has forced MWVBDs into the unfortunate position of having to turn away clients that wish to engage them on a type of transaction that is increasingly common.
- The limit of three temporary subordinated loans in any 12-month period, under the SEC’s Net Capital Rule (17 CFR § 240.15c3-1), sometimes forces MWVBDs to take less underwriting liability on transactions than they otherwise could. Increasing the limit even by one or two would significantly aid MWVBDs.
- The combined effect of FINRA Uniform Practice Rule 11880, which allows syndicate bookrunning managers 90 days to settle syndicate accounts, and the Net Capital Rule, which prevents co-managers from treating syndicate receivables as good capital if they are aged more than 30 days, hurts MWVBDs because they frequently serve as co-managers and, thus, often have significant syndicate receivables. This problem could be addressed by allowing co-managers to treat syndicate receivables as good capital if they are aged 90 days or less.

We would encourage FINRA to work with the SEC to consider appropriate rule changes or other regulatory relief so that these firms do not have to turn away business because of inflexible regulatory requirements. In addition to missing out on revenues that would help them grow, turning away business also deprives MWVBDs of opportunities to demonstrate their capabilities to both issuers and investors. Addressing these issues would put these firms on a more level playing field, benefitting both the securities industry and investors.

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DEI is a business imperative for our industry. SIFMA and its members are pleased to work with FINRA in advancing this important goal. Thank you for considering our comments, and please contact me at 202-962-7300 with any questions.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Ken Bentsen", with a long horizontal flourish extending to the right.

Kenneth E. Bentsen, Jr.
President and CEO