

## Third-Party Recordkeeping

### SEC Staff Issues Guidance on Third-Party Recordkeeping Services

#### Summary

This *Notice* provides firms with information regarding recent guidance (the guidance) issued by staff of the SEC's Division of Trading and Markets (the SEC staff) regarding the use of recordkeeping services provided by third parties to preserve records pursuant to SEA Section 17(a) and SEA Rule 17a-4.<sup>1</sup>

Questions concerning this *Notice* should be directed to:

- ▶ Kris Dailey, Vice President, Risk Oversight & Operational Regulation (ROOR), at (646) 315-8434 or [Kris.Dailey@finra.org](mailto:Kris.Dailey@finra.org);
- ▶ Yui Chan, Senior Director, ROOR, at (646) 315-8426 or [Yui.Chan@finra.org](mailto:Yui.Chan@finra.org); or
- ▶ Ann Duguid, Senior Director, ROOR, at (646) 315-7260 or [Ann.Duguid@finra.org](mailto:Ann.Duguid@finra.org).

#### Background & Discussion

The SEC staff recently issued guidance regarding contractual arrangements between broker-dealers and third-party recordkeeping service providers that include provisions permitting the third-party recordkeeping service providers to delete or discard the broker-dealer's records required to be preserved pursuant to SEA Rules 17a-3 and 17a-4, typically in response to non-payment by the broker-dealer of fees due under the contract.

In the guidance, the SEC staff stated that SEA Rule 17a-4(i) provides that, if the records a broker-dealer is required to preserve pursuant to SEA Rules 17a-3 and 17a-4 are prepared or maintained by an outside service bureau, depository, bank which does not operate pursuant to paragraph (b)(2) of Rule 17a-3, or other recordkeeping service (each referred to in the guidance as a "service provider"), the service provider shall file with the Commission a written undertaking in form acceptable to the Commission, signed by a duly authorized person, to the effect that such records are the property of the broker-dealer required to preserve such records and will be surrendered promptly on request of the broker-dealer. The SEC staff stated that the

September 14, 2018

#### Notice Type

- ▶ Guidance

#### Suggested Routing

- ▶ Compliance
- ▶ Finance
- ▶ Legal
- ▶ Operations
- ▶ Regulatory Reporting
- ▶ Senior Management

#### Key Topics

- ▶ Recordkeeping
- ▶ Third-Party Services

#### Referenced Rules & Notices

- ▶ SEA Section 17(a)
- ▶ SEA Rule 17a-3
- ▶ SEA Rule 17a-4

service provider also must undertake that with respect to any books and records preserved on behalf of the broker-dealer, the service provider will permit examination of such books and records at any time or from time to time during business hours by representatives or designees of the Commission, and to promptly furnish to the Commission or its designee true, correct, complete and current hard copy of any or all or any part of such books and records.<sup>2</sup>

In addition, the SEC staff stated that the Commission adopted paragraph (i) of Rule 17a-4 to assure the accessibility of broker-dealer records in situations where, for example, a service bureau refuses to surrender the records due to nonpayment of fees.<sup>3</sup> The SEC staff stated that, in adopting paragraph (i), the Commission emphasized that the records of a broker-dealer must be available at all times for examination in order to assure the protection of customers. Prior to adopting paragraph (i), the Commission had found that, in situations where a broker-dealer or its service providers were experiencing financial difficulty, the records of the broker-dealer had not always been available to the broker-dealer or to the Commission.<sup>4</sup> The SEC staff stated that, accordingly, contractual provisions that would permit, among other things, a service provider to delete or discard records in the event of non-payment by the broker-dealer are inconsistent with the retention requirements of SEA Rule 17a-4 and the undertaking requirements of paragraph (i) of Rule 17a-4. Moreover, the SEC staff stated that if a service provider deletes or discards broker-dealer records in a manner that is not consistent with the retention requirements of Rule 17a-4, such action would constitute a primary violation of the rule by the broker-dealer and may subject the service provider to secondary liability for causing or aiding and abetting the violation.

FINRA advises members that use third-party recordkeeping service providers to review their contracts for compliance with the SEC staff's guidance.

## Endnotes

1. See letter from Michael A. Macchiaroli, Associate Director, Division of Trading and Markets, Securities and Exchange Commission, to Kris Dailey, Vice President, Risk Oversight & Operational Regulation, FINRA (April 12, 2018), available on the [SEC's website](#). SEA Section 17(a) and SEA Rules 17a-3 and 17a-4 address among other things requirements as to records to be made and preserved by broker-dealers.
2. See paragraph (i) of SEA Rule 17a-4.
3. See footnote 4 of the guidance, citing in part to Exchange Act Release No. 13962 (September 15, 1977), 42 FR 47551 (September 21, 1977) (Rule Amendment: Recordkeeping by Brokers and Dealers) (amending SEA Rule 17a-4 to add paragraph (i) to the rule).
4. See note 3.