

## Custodian of Books and Records

### SEC Approves Amendments to FINRA Rule 4570

Effective Date: August 19, 2019

#### Summary

The Securities and Exchange Commission (SEC) approved a proposed rule change to amend FINRA Rule 4570 (Custodian of Books and Records) to: (1) provide a member firm that is filing a Form BDW (Uniform Request for Broker-Dealer Withdrawal) the option of designating another FINRA member firm as the custodian of its books and records on the form; (2) clarify the obligations of the designated custodian; and (3) require the designated custodian to consent to act in such a capacity.<sup>1</sup>

These changes become effective on **August 19, 2019**.

The text of the amended rule is set forth in Attachment A. The Custodian Consent Form is set forth in Attachment B.

Questions concerning this *Notice* should be directed to:

- ▶ Julia Bogolin, Counsel, Office of General Counsel, at (202) 728-8111 or [Julia.Bogolin@finra.org](mailto:Julia.Bogolin@finra.org).

Questions concerning submission of the Custodian Consent Form should be directed to:

- ▶ Mario DiTrapani, Vice President, Registration & Disclosure Operations, CRD/Public Disclosure, at 240-386-4796 or [Mario.DiTrapani@finra.org](mailto:Mario.DiTrapani@finra.org).

#### Background and Discussion

Rule 17a-4 under the Securities Exchange Act of 1934 (SEA or Exchange Act) requires broker-dealers to retain their books and records for specified retention periods.<sup>2</sup> Pursuant to SEA Rule 17a-4(g), a firm that stops doing business as a registered broker-dealer has a continuing obligation to retain its required books and records for the remainder of the specified retention periods. Form BDW requires a firm that is withdrawing its registration

April 22, 2019

#### Notice Type

- ▶ Rule Amendment

#### Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Operations
- ▶ Senior Management

#### Key Topics

- ▶ Books and Records
- ▶ Compliance Program
- ▶ Retention Requirements

#### Referenced Rules & Notices

- ▶ CAB Rule 457
- ▶ FINRA By-Laws, Article V, Section 4
- ▶ FINRA Rule 4511
- ▶ FINRA Rule 4570
- ▶ FINRA Rule 8210
- ▶ SEA Rule 17a-4

(Withdrawing Firm) to identify and provide the contact information of the person who will have custody of the Withdrawing Firm's books and records (Designated Custodian) after it has discontinued its business operations. Form BDW also requires the Withdrawing Firm to provide the address where the books and records will be located, if different than the address of the Designated Custodian. In addition, the Form BDW provides that the Withdrawing Firm and person signing the form on its behalf must certify that the books and records will be preserved and made available for inspection. Currently, FINRA Rule 4570 permits a Withdrawing Firm to designate only an associated person of the firm as its Designated Custodian.

### **Member Firms Acting as Designated Custodians**

To provide greater flexibility to member firms, FINRA has amended Rule 4570 to provide a Withdrawing Firm the option of designating another FINRA member firm as its Designated Custodian. The rule change does not require a Withdrawing Firm to designate another FINRA member firm as the Designated Custodian, but gives the firm that option. A Withdrawing Firm continues to have the option of designating an associated person of the firm as its Designated Custodian.

### **Obligations of Designated Custodians**

FINRA has also amended Rule 4570 to clarify the obligations of the Designated Custodian. Specifically, the amended rule clarifies that the Designated Custodian must preserve the books and records on behalf of the Withdrawing Firm for the remainder of the applicable retention periods and make them available for inspection by FINRA upon request. For example, if the Designated Custodian receives a record from the Withdrawing Firm that had an original retention period of six years, four years of which have already passed, the Designated Custodian must retain that record for the remaining two years and provide it to FINRA upon request.

In addition, the amended rule clarifies that the Designated Custodian is required to preserve and produce the Withdrawing Firm's books and records in the same state in which they were received. This provision is intended to ensure that the Designated Custodian does not alter the records after taking possession of them. The Designated Custodian would not be precluded from converting the books and records in its possession into another format acceptable under the Exchange Act (*e.g.*, convert from paper format to an electronic storage media), so long as such records are not altered or deleted during the conversion process.

Further, amended Rule 4570 requires that where a member firm is the Designated Custodian, the member firm must: (1) treat the books and records that it receives from the Withdrawing Firm as if they were its own books and records; and (2) arrange upon its dissolution for the books and records of the Withdrawing Firm to continue to be retained for the remainder of the applicable retention periods under FINRA and Exchange Act rules in the same manner as its own books and records consistent with FINRA Rule

4570. However, the amended rule clarifies that where a member firm is the Designated Custodian, it would not be required to verify the completeness or accuracy of the books and records it receives from the Withdrawing Firm. This exception is limited to member firms that are acting as Designated Custodians because their function is more akin to that of a recordkeeping service. The exception would not apply where an associated person of the Withdrawing Firm is the Designated Custodian, because the associated person should be in a position to verify the completeness and accuracy of the Withdrawing Firm's books and records based on his or her existing relationship with the firm.

### Consent Requirements

Finally, FINRA has amended Rule 4570 to ensure that Designated Custodians are aware of their obligations and provide informed consent. Specifically, the amended rule requires the Withdrawing Firm to inform the Designated Custodian of the applicable obligations under FINRA and Exchange Act rules, including Rule 4570, and to obtain the affirmative written or oral consent of the Designated Custodian.

In addition, Designated Custodians would be required to complete and submit to FINRA a Custodian Consent Form, which provides, among other things, that they: (1) have consented to act in the capacity of a custodian; (2) understand the responsibilities of a custodian; and (3) agree to provide the books and records of the Withdrawing Firm to FINRA upon request during the course of the required retention periods. A copy of the Custodian Consent Form is attached to this *Notice*.<sup>3</sup>

### Completion and Submission of Custodian Consent Form

The Designated Custodian must complete the Custodian Consent Form by providing the name and CRD number of the Withdrawing Firm and signing the form. The form provides a signature box for a Designated Custodian who is an associated person of the Withdrawing Firm, and an alternative signature box for a Designated Custodian that is a member firm.<sup>4</sup> The Designated Custodian must only complete and sign the **applicable** signature box.

The Designated Custodian must then send the completed Custodian Consent Form as a scanned email attachment to [BDW@finra.org](mailto:BDW@finra.org). Designated Custodians that are unable to submit the form via email should contact the FINRA Gateway Call Center at (301) 869-6999 to make alternative arrangements. The Designated Custodian should submit the completed Custodian Consent Form concurrently with the Withdrawing Firm's submission of the Form BDW.

Additional information regarding the broker-dealer registration withdrawal process is available on FINRA's website.

## Endnotes

1. See Securities Exchange Act Release No. 85209 (February 27, 2019), 84 FR 7945 (March 5, 2019) (Order Approving File No. SR-FINRA-2018-039). The rule change impacts all member firms, including those that have elected to be treated as capital acquisition brokers (CABs), given that the CAB rule set incorporates the impacted FINRA rule by reference. See CAB Rule 457.
2. See *also* FINRA Rule 4511 (General Requirements).
3. See Attachment B.
4. A person signing the Custodian Consent Form on behalf of a member firm must be associated with that firm and be authorized to execute the form on the firm's behalf.

## ATTACHMENT A

Below is the text of the amended rule text. New language is underlined; deletions are in brackets.

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### 4000. FINANCIAL AND OPERATIONAL RULES

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### 4500. BOOKS, RECORDS AND REPORTS

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#### 4570. Custodian of Books and Records

##### **(a) Designation of Custodian**

A member [who] that files a Form BDW shall designate on the Form BDW, as the custodian of the member's books and records[,]; (i) a person associated with the member at the time that the Form BDW is filed; or (ii) another FINRA member.

##### **(b) Obligations of Custodians**

The custodian designated on the Form BDW shall preserve the books and records of the member that filed the Form BDW for the remainder of the applicable retention periods under FINRA and Exchange Act rules and make such records available for inspection by FINRA upon request. Further, the custodian shall preserve and produce such books and records in the same manner in which they were received from the member that filed the Form BDW.

Where a member has agreed to act as custodian of the books and records of another member that has filed a Form BDW, the member that has agreed to act as custodian shall: (i) treat such books and records as if they were its own books and records; and (ii) arrange upon its dissolution for such books and records to continue to be retained for the remainder of the applicable retention periods under FINRA and Exchange Act rules in the same manner as its own books and records consistent with this Rule.

##### **(c) Consent Requirement**

A member that is filing a Form BDW shall, before the submission of the form, obtain from the person designated on the form as custodian of the member's books and records the person's affirmative consent to act in such a capacity. Prior to obtaining a custodian's consent, such member shall inform the custodian of its obligations under the Exchange Act and FINRA Rules, including this Rule.

A person designated on a Form BDW as custodian of a member's books and records shall, at the time that the Form BDW is filed, represent to FINRA, in a method prescribed by FINRA, that the person: (i) consented to act as a custodian; (ii) understands the responsibilities of a custodian; and (iii) shall provide to FINRA upon request during the course of the required retention periods the books and records of the member for which the person is acting as a custodian.

**••• Supplementary Material: -----**

**.01 Converting Records to Other Acceptable Formats.** Nothing in paragraph (b) of this Rule shall preclude the custodian from converting a record from a format acceptable under FINRA and Exchange Act rules to another format acceptable under such rules (e.g., converting from paper to electronic storage media), provided that such records are not altered or deleted during the conversion process.

**.02 Members Acting as Custodians.** Nothing in paragraph (b) of this Rule shall require a member that is acting as custodian to verify the completeness or accuracy of the books and records that it is receiving from the member that filed the Form BDW.

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Please submit the consent form by email to [BDW@finra.org](mailto:BDW@finra.org). If you are unable to submit the consent form via email, please contact FINRA Gateway at (301) 869-6999 to make alternative arrangements.

1. You hereby consent to act as the custodian of the books and records for

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[Broker Dealer Name]

[CRD No.]

(hereinafter the “**Withdrawing Broker-Dealer**”) upon the filing of the **Withdrawing Broker-Dealer’s** Uniform Request for Broker-Dealer Withdrawal (Form BDW).

2. You represent that prior to providing your consent to act as the custodian, the **Withdrawing Broker-Dealer** informed you of your obligations under FINRA rules, including FINRA Rule 4570, as well as under the Securities Exchange Act of 1934.
3. You agree to retain the books and records provided to you by the **Withdrawing Broker-Dealer** for the duration of the applicable retention periods, including the retention periods specified under FINRA rules as well as under the Securities Exchange Act of 1934.
4. You agree to retain the books and records provided to you by the **Withdrawing Broker-Dealer** in the manner in which you received them from the **Withdrawing Broker-Dealer** without any alteration or deletion, provided that, for retention purposes, you may convert such books and records into another format acceptable under the Securities Exchange Act of 1934 so long as such books and records are not altered or deleted during the conversion process.
5. You agree to provide the books and records provided to you by the **Withdrawing Broker-Dealer** to FINRA staff upon request during the course of their retention periods.
6. If you are a member firm, you agree to treat the books and records provided to you by the **Withdrawing Broker-Dealer** as if they were your own books and records, and you agree that upon your termination as a member firm you will arrange for the books and records provided to you by the **Withdrawing Broker-Dealer** to continue to be retained for the remainder of the applicable retention periods in the same manner as your own books and records consistent with FINRA Rule 4570.

By signing below, you confirm that you understand the above-specified obligations and responsibilities.

**FOR ASSOCIATED PERSON OF WITHDRAWING BROKER-DEALER DESIGNATED AS CUSTODIAN**

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[name of associated person]

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[signature of associated person]

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[date]

**FOR MEMBER FIRM DESIGNATED AS CUSTODIAN**

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[member firm name & CRD No.]

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[name of authorized agent signing on behalf of member firm]

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[signature of authorized agent]

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[date]