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THE Committee OF Annuity Insurers
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January 3, 2022

Via E-Mail
Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-1090

Re: File No. S7-19-2
Electronic Recordkeeping Requirements for Broker-Dealers, Security-Based Swap Dealers, and Major Security-Based Swap Participants

Dear Secretary:

We are submitting this letter on behalf of our client, the Committee of Annuity Insurers (the "Committee"),[1] in response to the U.S. Securities and Exchange Commission's ("SEC") proposed amendments (the "Proposed Rule") to the electronic recordkeeping requirements for broker-dealers pursuant to Rule 17a-4 ("Rule 17a-4") under the Securities Exchange Act of 1934, as amended (the "1934 Act").[2]

BACKGROUND

Rule 17a-4 under the 1934 Act currently requires broker-dealers to, among other things, preserve electronic records exclusively in a non-rewriteable, non-erasable format, which is commonly referred to as "write once, read many" or "WORM" format.[3] The Proposing Release seeks to modify Rule 17a-4 by adding a second electronic recordkeeping option for broker-dealers, referred to as the "audit-trail alternative."[4] The audit-trail alternative would allow firms to preserve electronic records in a manner that permits the recreation of an original record if it is altered, over-written, or erased. If a firm utilizes the audit-trail alternative, its electronic recordkeeping system would be required to preserve a complete audit trail, which would need to include (1) all modifications to and deletions of a record; (2) the date and time of operator entries and actions that create, modify, or delete the record; (3) the individuals creating, modifying, or deleting a record; and (4) any other information needed to maintain an audit trail. Any broker-dealers adopting the audit-trail alternative would need to furnish any electronic records in a "reasonably usable electronic

[1] The Committee is a coalition of many of the largest and most prominent issuers of annuity contracts. The Committee's 31 member companies represent more than 80% of the annuity business in the United States. The Committee was formed in 1981 to address legislative and regulatory issues relevant to the annuity industry and to participate in the development of insurance, securities, banking, and tax policies regarding annuities. For over three decades, the Committee has played a prominent role in shaping government and regulatory policies with respect to annuities at both the federal and state levels, working with and advocating before the SEC, CFTC, FINRA, IRS, Treasury Department, and Department of Labor, as well as the NAIC and relevant and Congressional committees. A list of the Committee's member companies is available on the Committee's website at www.annuity-insurers.org/about-the-committee/.

[2] The SEC's release on the proposed rulemaking is posted at https://www.sec.gov/rules/proposed/2021/34-93614.pdf ("Proposing Release").

[3] *See* Rule 17a-4(f)(2)(ii)(A).

[4] *See* Proposed Rule 17a-4(f)(2)(i)(A).

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format" if those records are requested by the SEC.[5] The SEC clarified that a "reasonably usable electronic format" would not include a firm's proprietary electronic format that the SEC could not access or read using commonly available systems.[6]

In addition, and of interest to the Committee, the Proposed Rule would eliminate the designated third-party access and undertaking requirements (commonly referred to as the "D3P" undertaking) currently in Rule 17a-4(f)(3)(vii). The proposal would replace this D3P undertaking with a requirement that a "senior officer" of the broker-dealer, who has independent access to and the ability to provide the electronic records, execute an undertaking and provide access to the firm's records upon a regulator's request.[7]

The Proposed Rule would also, among other things, eliminate the notice and representation requirements from Rule 17a-4(f)(2)(i), which currently apply before a broker-dealer intends to employ electronic storage media to maintain any of its required records.[8] This proposed change means that broker-dealers would no longer need to provide prior notice, or furnish the WORM representations, to the SEC before using electronic records.

COMMITTEE COMMENTS

We note that our comments focus on the aspects of the Proposed Rule dealing with broker-dealer requirements. We do not address those aspects of the Proposed Rule which deal with security-based swap dealers and major security-based swap participants.

The Committee appreciates the opportunity to comment on the Proposed Rule and is generally supportive of the proposed changes. The Committee notes that the Proposed Rule eliminates outdated and unnecessary requirements and offers broker-dealers greater flexibility in their storage of electronic records. The Committee supports the modernization of the electronic recordkeeping requirements and a shift to a more "business-friendly" approach, which would better align the rules with current technologies and broker-dealer practices. The Proposed Rule's approach, in part, addresses the excessive costs associated with WORM storage requirements, which ultimately impede innovation and hinder industry competition.

In addition, the Committee generally supports the Proposed Rule because it offers a more flexible approach to electronic recordkeeping requirements, without sacrificing any investor protection or regulatory interests. Many of the current electronic recordkeeping requirements prescribe onerous WORM requirements that make it challenging for broker-dealers to best serve their clients' interests. The flexibility offered by the Proposed Rule helps broker-dealers support their clients' needs by allowing firms to maintain and preserve their client records in a more dynamic and less prescriptive electronic format.

While generally supporting the direction of the Proposed Rule, the Committee offers the following specific comments with a view to enhancing or clarifying certain aspects of the Proposed Rule. In particular, the Committee's primary substantive concerns focus on the prescriptive nature of the audit-trail alternative and the requirement that firms designate a "senior officer" to have independent access to, and the ability to provide, the firm's electronic records upon a regulator's request.

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[5] *See* Proposed Rule 17a-4(j).

[6] *See* Proposing Release at p. 28.

[7] *See* Proposed Rule 17a-4(f)(3)(vii).

[8] *See* Proposing Release at pp. 17-18.

COMMENTS ON PROPOSED RULE

Principles-Based Approach for the Audit Trail. The SEC explains in its Proposing Release that it intentionally decided against proposing a "principles-based" electronic recordkeeping requirement, instead opting for a prescriptive audit-trail alternative.[9] As described in more detail above, the audit-trail alternative would require specific information to be preserved by the firm's recordkeeping system, including all modifications and deletions of a record, the date and time of changes to records, the names of individuals changing the record, and any other information needed to maintain an accurate audit trail.[10]

In opting for a prescriptive audit-trail alternative, the SEC acknowledged that it considered the principles-based electronic recordkeeping requirements adopted by the Commodity Futures Trading Commission ("CFTC") in 2017.[11] Among other things, the principles-based approach adopted by CFTC required firms to retain records "in a form and manner that ensures the authenticity and reliability of such regulatory records."[12] The SEC also acknowledged in the Proposing Release that it considered a 2017 rulemaking petition, which requested that the SEC replace the WORM requirement with a more flexible "principles-based requirement" similar to the one adopted by the CFTC.[13]

Despite considering these principle-based approaches, the SEC's proposal still prescribes specific recordkeeping requirements, as well as specific information that must be collected by firms that elect the audit-trail alternative. The audit-trail alternative proposed by the SEC is not "technology-neutral" and mandates specific technology requirements and electronic formats for broker-dealers, which reduce the ability for firms to implement future technological innovations or advancements. The Committee requests that the SEC reconsider its decision not to adopt a principles-based approach to electronic recordkeeping, as it would allow firms greater flexibility to implement systems tailored to their business activities and technological specifications, without sacrificing the SEC's goal of preserving "the security and authenticity of and access to records."[14] For guidance on how the SEC should implement this principles-based approach, the Committee urges the SEC to revisit the 2017 rulemaking petition mentioned above, which proposed specific language for a principles-based version of Rule 17a-4(f).

Senior Officer. The Proposed Rule would eliminate the D3P undertaking in Rule 17a-4(f)(3)(viii) and replace it with a requirement that a "senior officer" of the broker-dealer, who has independent access to and the ability to provide the electronic records, execute an undertaking and provide access to the firm's records upon a regulator's request.[15] The Proposing Release does not specifically define what is meant by a "senior officer" for purposes of the Proposed Rule, but it does clarify that "independent access" would mean that the senior officer has the "knowledge, credentials, and information necessary to access and provide the records without having to rely on other individuals at the firm."[16]

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[9] *See* Proposing Release at p. 94.

[10] *See* Proposed Rule 17a-4(f)(2)(i)(A).

[11] *See* CFTC, *Recordkeeping*, 82 FR 24479 (May 30, 2017), available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/file/2017-11014a.pdf.

[12] *Id.*

[13] *See* SEC Rulemaking Petition 4-713 (Nov. 14, 2017) filed by the Securities Industry Financial Markets Association, Financial Services Roundtable, Futures Industry Association, International Swaps Derivatives Association, and Financial Services Institute, available at: https://www.sec.gov/rules/petitions/2017/petn4-713.pdf.

[14] *See* Proposing Release at p. 70.

[15] *See* Proposed Rule 17a-4(f)(3)(vii).

[16] *See* Proposing Release at pp. 40-41.

Many broker-dealers enter into shared services agreements with certain affiliated companies. For instance, in the case of broker-dealers affiliated with Committee members, the broker-dealer could have in place a shared services agreement with the insurer or another affiliate. Pursuant to these shared services agreements, certain administrative or recordkeeping functions are historically performed on behalf of the broker-dealer by its affiliated companies.[17] Broker-dealers using these enterprise-wide recordkeeping solutions may need additional flexibility to designate a senior officer of their affiliates, including an affiliated insurance company or management services company, to make the required undertaking and have the required access. The Committee requests that the SEC clarify that a "senior officer" could include senior officers of a broker-dealer's affiliated companies.

Transition Period. The Proposed Rule does not provide much detail regarding how firms would transition from their current WORM recordkeeping system to the new audit-trail alternative. In addition, the SEC does not clarify how broker-dealers should transition away from the requirements that were eliminated by the Proposed Rule, namely the required D3P undertaking in Rule 17a-4(f)(3)(vii), and the notice and WORM representation requirements in Rule 17a-4(f)(2)(i).

For instance, terminating a third-party relationship with a WORM recordkeeping provider may result in challenges for broker-dealers attempting to "cut-off" access for the WORM provider, and transition its existing records from the WORM provider to a new service provider that complies with the audit-trail alternative. The Proposed Rule is also not clear whether a broker-dealer would need to rescind or withdraw its prior undertakings, notices, or WORM representations filed pursuant to Rule 17a-4, or whether a broker-dealer would need to notify the SEC before transitioning to the audit-trail alternative. The Committee requests guidance and clarification from the SEC related to these items.

17a-4(i) Undertaking. Although the SEC eliminated the D3P undertaking in paragraph (f) of Rule 17a-4, the Proposed Rule did not amend the outside service provider undertaking in paragraph (i). This undertaking is generally designed to ensure the accessibility of broker-dealer records in situations where a third-party service provider refuses to transfer records to the broker-dealer due to nonpayment of fees. The SEC should consider relaxing this requirement. We note that many broker-dealers struggle to find outside recordkeeping vendors willing to provide such an undertaking. For instance, many cloud service providers, such as Microsoft and Amazon, do not have the ability to make the undertaking in Rule 17a-4(i), as these files are typically encrypted and only accessible by the broker-dealer firm using the cloud storage services. Given the inability for cloud providers to make (or, in some cases, their refusal to assume liability for making) the undertaking required by Rule 17a-4(i), the SEC should consider relaxing or eliminating this undertaking entirely.

Existing SEC Guidance and Interpretations. The SEC has issued various forms of guidance and interpretations addressing broker-dealer electronic recordkeeping requirements since Rule 17a-4(f) was adopted in 1997, including interpretations in 2001,[18] 2003,[19] and 2019.[20] Although

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[17] *See, e.g. Distributions of Variable Annuities by Insurance Companies Broker-Dealer Registration and Regulation Problems Under the Securities Exchange Act of 1934*, Exchange Act Release No. 8389 (Aug. 29, 1968).

[18] *See SEC Interpretation: Commission Guidance to Broker-Dealers on the Use of Electronic Storage Media under the Electronic Signatures in Global and National Commerce Act of 2000 with Respect to Rule 17a-4(f)*, Exchange Act Release No. 44238 (May 1, 2001), available at https://www.sec.gov/rules/interp/34-44238.htm.

[19] *See Electronic Storage of Broker-Dealer Records*, Exchange Act Release No. 47806 (May 7, 2003), available at https://www.sec.gov/rules/interp/34-47806.htm.

[20] *See Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers*, Exchange Act Release No. 87005 (Sept. 19, 2019), available at https://www.sec.gov/rules/final/2019/34-87005.pdf.

the SEC clarified that its 2003 interpretation was still "extant," the Committee requests additional guidance regarding how this interpretation, as well as the other interpretations mentioned above, should be impacted by or read in conjunction with the proposed amendments.[21]

ADDITIONAL CONSIDERATIONS

Guidance on "Business as Such" Records. As previously stated, the Committee generally supports the SEC's proposed elimination of outdated recordkeeping requirements in favor of modernized and more flexible recordkeeping alternatives. Given the SEC's willingness to reconsider certain aspects of Rule 17a-4, the Committee would like to use this opportunity to identify some of the challenges it sees related to the broad "catch-all" requirement in Rule 17a-4(b)(4) for broker-dealers to maintain copies of all communications relating to their "business as such."

With offices closed due to the pandemic and the growth of remote working environments, broker-dealers have implemented several new virtual tools and interactive platforms for internal communications, including Slack, Zoom, and Microsoft Teams. These tools offer collaborative communication abilities, such as "chat" features, virtual white boarding sessions, and shared document editing, among others. The Committee believes it would be helpful if the SEC would provide guidance on its views of how these more dynamic and interactive virtual communication systems should be viewed under Rule 17a-4(b)(4).

CONCLUSION

The Committee appreciates the opportunity to provide these comments on the Proposed Rule. Please do not hesitate to contact Clifford Kirsch (212.389.5052 or CliffordKirsch@eversheds-sutherland.com) or Eric Arnold (202.383.0741 or EricArnold@eversheds-sutherland.com) with any questions or to discuss this comment letter.

Respectfully submitted,

Eversheds Sutherland (US) LLP

FOR THE COMMITTEE OF ANNUITY INSURERS

[21] *See* Proposed Rule at p. 26.