UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
TRADING AND MARKETS

January 11, 2010

Mr. Ryan Foster
Manager, Office of General Counsel
Securities Industry and Financial Markets Association
1101 New York Avenue, NW, 8th Floor
Washington, DC 20005

Re: Financial Recordkeeping and Reporting of Currency and Foreign Transactions/Broker-Dealer Customer Identification Program Rule

Dear Mr. Foster:

In your letter dated January 7, 2010, you request assurances that the staff of the Division[1] will not recommend enforcement action to the Commission under Exchange Act Rule 17a-8 if a broker-dealer relies on a registered investment adviser to perform some or all of its CIP obligations, subject to the conditions set forth in your incoming letter. Specifically, you request that the Division take a no-action position similar to a no-action position that it took in 2004,[2] and again in 2005,[3] 2006[4] and 2008.[5]

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1 Unless otherwise noted, each defined term in this letter has the same meaning as those defined directly or by reference in your letter.

2 See Letter from Annette L. Nazareth, Director, Division, Commission, to Alan Sorcher, Securities Industry Association ("SIA"), dated February 12, 2004 ("2004 Letter").

3 See Letter from Annette L. Nazareth, Director, Division, Commission, to Alan Sorcher, SIA, dated February 10, 2005. This letter extended the relief in the 2004 Letter until the earlier of an AML Program Rule for advisers becoming effective or July 12, 2006.

4 See Letter from Robert L.D. Colby, Acting Director, Division, Commission, to Alan Sorcher, SIA, dated July 11, 2006. This letter extended the relief in the 2004 Letter until the earlier of a rule for advisers becoming effective or January 12, 2008.

5 See Letter from Erik Sirri, Director, Division, Commission, to Alan Sorcher, SIFMA, dated January 10, 2008. This letter extended the relief in the 2004 Letter until the earlier of a rule for advisers becoming effective or January 12, 2010.

On February 12, 2004, the Division, in consultation with FinCEN,[6] issued a letter stating that it would not recommend enforcement action to the Commission if a broker-dealer treated a registered investment adviser[7] as if it were subject to an AML Program Rule under 31 U.S.C. 5318(h) for the purposes of paragraph (b)(6) of the CIP Rule.[8] By its terms, the 2004 Letter was to be withdrawn without further notice on the earlier of: (1) the date upon which an AML Program Rule for investment advisers became effective, or (2) February 12, 2005. Because an AML Program Rule for investment advisers did not become effective, the no-action position in the 2004 Letter was extended for an additional 18 months on February 10, 2005,[9] for an additional 18 months on July 11, 2006,[10] and for an additional 2 years on January 10, 2008.[11]

In your letter, you indicate that broker-dealers have come to rely on the no-action position that was taken in the 2004 Letter and expect that the Division will once again take that position. You also indicate that absent a re-issuance of the no-action position in the 2004 Letter, broker-dealers would need time to re-evaluate relationships that were entered into in reliance on the 2004 Letter and the subsequent no-action positions.

Response

Without necessarily agreeing with your assertions, the Division, following further consultation with FinCEN staff, extends the no-action position in the 2004 Letter for an additional 12 months, subject to some modifications. Accordingly, the Division will not recommend enforcement action to the Commission under Exchange Act Rule 17a-8 if a broker-dealer treats an investment adviser as if it was subject to an AML Program Rule for the purposes of paragraph (b)(6) of the CIP Rule provided that the other provisions of the CIP Rule are met and: (1) reliance on the investment adviser is reasonable under the circumstances; (2) the investment adviser is registered with the Commission; (3) the investment adviser enters into a contract with the broker-dealer requiring it to certify annually to the broker-dealer that it has implemented its own AML Program that is consistent with the requirements of 31 U.S.C. 5318(h); and (4) the adviser (or its agent) performs the specified requirements of the broker-dealer's CIP.

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6 FinCEN is a bureau within the Department of the Treasury that administers the Currency and Financial Transactions Reporting Act of 1970 (commonly referred to as the Bank Secrecy Act). 12 U.S.C. § 1829b, 12 U.S.C. §§ 1951-1959, and 31 U.S.C. §§ 5311-5330.

7 Sections 203 and 203A of the Investment Advisers Act of 1940, and the rules promulgated thereunder, govern which investment advisers must be registered with the Commission. 15 U.S.C. §§ 80b-3 and 80b-3a.

8 See 2004 Letter, supra note 2.

9 See supra note 3.

10 See supra note 4.

11 See supra note 5.

The no-action position taken by this letter will be withdrawn without further action on January 10, 2011.[12]

This is a staff position with respect to enforcement action only and does not purport to express any legal conclusions. It may be withdrawn or modified if the staff determines that such action is necessary to be consistent with the Bank Secrecy Act and in the public interest.

Sincerely,

Daniel M. Gallagher, Jr.
Deputy Director

cc: James H. Freis, Jr., Director
FinCEN

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12 If FinCEN re-proposes an AML Program rule for investment advisers before January 10, 2011, the Division staff will reconsider the terms of this no-action position.

SIFMA®
Securities Industry and
Financial Markets Association

January 7, 2010

Via Email and Courier

Daniel M. Gallagher, Jr.
Deputy Director
Division of Trading and Markets
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: No Action Request Under Broker-Dealer Customer Identification Rule (31 C.F.R. § 103.122)

Dear Mr. Gallagher:

The Securities Industry and Financial Markets Association ("SIFMA")[1] is submitting this request on behalf of its member broker-dealers for No Action relief with respect to the reliance provisions in the customer identification rule ("CIP Rule") applicable to broker-dealers (31 C.F.R.§103.122) issued pursuant to Section 326 of the USA PATRIOT Act.[2] Generally, the CIP Rule requires broker-dealers to adopt written customer identification programs ("CIP") that include risk-based procedures for verifying the identity of each customer.

SIFMA requests that broker-dealers be able to rely on registered investment advisers to perform some or all of the broker-dealer's CIP. To that end, we seek assurances from the staff of the Division of Trading and Markets ("Division")[3] that it will not recommend enforcement action to the U.S. Securities and Exchange Commission ("Commission") if a broker-dealer, subject to the conditions set forth in this letter, relies on a registered investment adviser under 31 C.F.R.§103.122(b)(6) to perform some or all of its customer identification program obligations.

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[1] The Securities Industry and Financial Markets Association brings together the shared interests of more than 600 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

[2] "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001," ("PATRIOT Act") Pub. L. No. 107-56 (2001), signed into law by President Bush on October 26, 2001.

[3] The Division was formerly known as the Division of Market Regulation.

Previous No Action Requests Have Been Granted

On February 12, 2004, the staff of the Division of Market Regulation (f/k/a the Division of Trading and Markets), in consultation with Department of Treasury's Financial Crimes Enforcement Network ("FinCEN"), issued a letter stating that it would not recommend to the Commission that enforcement action be taken if a broker-dealer treated a registered investment adviser as if it were subject to an anti-money laundering program rule ("AML Program Rule") under 31 U.S.C. 5318(h) for the purposes of paragraph (b)(6) of the CIP Rule.[4] In the 2004 Letter, the Division provided that the letter would be withdrawn without further notice on the earlier of: (1) the date upon which an AML Program Rule for advisers became effective, or (2) February 12, 2005. The relief in the 2004 Letter was subsequently extended for an additional 18 months on February 10, 2005[5] and again on July 11, 2006.[6]

Most recently, on January 10, 2008, the Division issued a letter stating that it would not recommend to the Commission that enforcement action be taken under Rule 17a-8 of the Securities Exchange Act of 1934 ("Exchange Act")[7] if a broker-dealer relies on an investment adviser to perform some or all of its CIP, prior to such adviser becoming subject to an AML Program Rule, provided all of the other requirements and conditions in paragraph (b)(6) of the CIP Rule are met, namely that: (1) such reliance is reasonable under the circumstances; (2) the investment adviser is regulated by a Federal functional regulator; and (3) the investment adviser enters into a contract requiring it to certify annually to the broker-dealer that it has implemented an anti-money laundering program, and that it will perform (or its agent will perform) specified requirements of the broker-dealer's customer identification program.[8] The 2008 letter extended the relief provided in the previous letters on the earlier of: (1) the date upon which an AML Program Rule for advisers becomes effective, or (2) January 12, 2010.

CIP Rule Requirements

The CIP Rule provides that a broker-dealer is required to implement a CIP that has procedures for: (1) verifying the identities of customers; (2) maintaining records related to the identification and verification of customers; (3) determining whether a customer appears on a designated list of terrorists or terrorist organizations; and (4)

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[4] Letter from Annette L. Nazareth, Director, Division, Commission, to Alan Sorcher, Securities Industry Association, dated February 12, 2004 ("2004 Letter").

[5] Letter from Annette L. Nazareth, Director, Division, Commission, to Alan Sorcher, Securities Industry Association, dated February 10, 2005. This letter extended the relief until the earlier of a rule for advisers becoming effective or July 12, 2006.

[6] Letter from Robert L.D. Colby, Acting Director, Division, Commission, to Alan Sorcher, Securities Industry Association, dated July 11, 2006. This letter extended the relief until the earlier of a rule for advisers becoming effective or January 12, 2008.

[7] 17 CFR 240.17a-8.

[8] Letter from Erik Sirri, Director of Division of Trading and Markets, Commission, to Alan Sorcher, SIFMA, dated January 10, 2008. This letter extended the relief until the earlier of a rule for advisers becoming effective or January 12, 2010.

providing customers with notice that information is being obtained to verify their identities.

Under paragraph (b)(6) of the CIP Rule, a firm may rely on certain other financial institutions to perform any of the required elements of the CIP for customers that are also customers of the other institution. A broker-dealer may rely on another financial institution if the following criteria are met: (1) reliance is reasonable under the circumstances; (2) the other financial institution is subject to an AML Program Rule, and is regulated by a Federal functional regulator; and (3) the other financial institution enters into a contract requiring it to certify annually to the broker-dealer that it has implemented its anti-money laundering program and that it will perform the specified requirements of the CIP, as outlined above.

SIFMA believes strongly that the reliance provisions of the CIP Rule play an important and necessary role in effective anti-money laundering compliance because intermediary and shared business relationships are a common and legitimate part of the securities industry and U.S. capital markets. Such reliance, by permitting two financial institutions with the same customer to rely on one another to perform some or all of the CIP requirements, avoids duplication of efforts and inefficient allocation of significant resources.

Reliance on Registered Investment Advisers

Many broker-dealers would like to rely on registered investment advisers under the CIP Rule to perform some or all of the CIP obligations with respect to customers with whom both have a client relationship. At present, such reliance would not be permitted under the CIP Rule because investment advisers are not subject to an AML Program Rule. Although an AML Program Rule for advisers was proposed by FinCEN in April 2003, it was later withdrawn.[9]

Nevertheless, we believe that the Division's No-Action position should be re-issued because, since 2004, many firms have to come to rely on the Division's relief and absent a re-issuance, broker-dealers will need time to re-evaluate any relationships that have been entered into because of the relief. Also, we believe that the interaction between broker-dealers and advisers is the type of relationship intended to be covered by the reliance provisions, and should be available immediately to firms in a position to undertake such reliance. This is because advisers often have the most direct relationship with the customers they introduce to broker-dealers and are best able to obtain the necessary documentation and information from and about their customers. Moreover, investment advisers are often reluctant to share their client information because they view the other institution as their competitor. Therefore, investment advisers are in many situations, in the best position to perform some or all of the requirements of the CIP Rule.

[9] 73 Fed. Reg. 65568 (November 4, 2008).

In fact, we believe some advisers have already implemented AML programs and may be in a position to enter into reliance contracts.

Under our proposal, broker-dealers may treat a registered investment adviser as if it were subject to an AML Program Rule for the purposes of paragraph (b)(6) of the CIP Rule (31 C.F.R. § 103.122(b)(6)) only where: (1) such reliance is reasonable under the circumstances; (2) the investment adviser is registered with the Commission; (3) the investment adviser enters into a contract with the broker-dealer requiring it to certify annually to the broker-dealer that it has implemented its own anti-money laundering program that is consistent with the requirements of 31 U.S.C. 5318(h); and (4) the adviser (or its agent) performs the specified requirements of the broker-dealer's CIP.

We thank you for the opportunity to submit this comment letter. We would be happy to discuss with you any of the comments described above or any other matters you feel would be helpful in your review of the No Action Request. Please do not hesitate to contact Ryan Foster at 202-962-73288 or via email at rfoster@sifma.org if you would like to discuss these matters further.

Respectfully submitted,

Ryan D. Foster
Manager, SIFMA
Office of General Counsel

cc: James H. Freis, Jr. Director
FinCEN