

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 241

[Release No. 34-47910]

Books and Records Requirements for Brokers and Dealers Under the Securities Exchange Act of 1934

AGENCY: Securities and Exchange Commission.

ACTION: Interpretation.

SUMMARY: The Securities and Exchange Commission is publishing guidance to clarify certain issues relating to broker-dealer books and records rules. Some of these issues have been raised as a result of the amendments to these rules that were adopted on October 26, 2001.

EFFECTIVE DATE: May 29, 2003.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Introduction

Section 17(a)(1) of the Securities Exchange Act of 1934 ("Exchange Act") requires registered broker-dealers to make, keep, furnish, and disseminate reports the Securities and Exchange Commission (the "Commission") deems "necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title." Rule 17a-3¹ and Rule 17a-4² under the Exchange Act (the "Books and Records Rules") specify minimum requirements with respect to the records that broker-dealers must make, and how long those records and other documents relating to a broker-dealer's business must be kept.

The Commission amended its Books and Records Rules on October 26, 2001³ to clarify and expand recordkeeping requirements with respect to purchase and sale documents, customer records, associated person records, customer complaints, and certain other matters. The amendments expanded the types of records that broker-dealers must maintain and required broker-dealers to

maintain or promptly produce certain records at each office to which those records relate. The amendments were designed to assist securities regulators, particularly State⁴ securities regulators, when conducting sales practice examinations of broker-dealers. Certain interpretive questions have arisen regarding these amendments.

II. Interpretive Questions

The Commission has received questions from broker-dealers, industry representatives, and regulators, requesting clarification of certain requirements under the Books and Records Rules. These questions, along with the Commission's answers to these questions are as follows:

Question #1

New paragraphs (a)(6) and (a)(7) of Rule 17a-3 require a broker-dealer to create a record of each brokerage order and for each purchase or sale for the account of the broker-dealer showing, among other things, the time the order was received. Under Rules 17a-3(a)(6) and (a)(7), is the broker-dealer required to record the time of receipt of an order to purchase a mutual fund, variable annuity, or direct participation plan that is effected on a basis other than subscription—way where the purchase price is determined only once daily at the close of business?

Answer #1

If the time of receipt is material to an order, then the broker-dealer must record the time of receipt on the order ticket. Generally, for many types of transactions, the time of receipt may be material to the price or other terms of the execution of the order. For example, recording the time of receipt would be material if an intra-day time deadline existed that determined whether the order was priced as-of the date the order was received or the price as-of the next day. If the broker-dealer does not record the time of receipt of an order, the broker-dealer must be able to demonstrate that the time of receipt is not material to that order.

Question #2

New Rule 17a-3(a)(17) provides that each registered broker-dealer must create an account record for "each account with a natural person as a customer or owner." Broker-dealers have specifically asked whether the term "account with a natural person as

a customer or owner" would include accounts of a corporation, partnership, limited liability company, or trust, or a Uniform Gift/Transfer to Minor Act (commonly referred to as an UGMA or UTMA) account, IRA account, or 401k account?

Answer #2

The account record requirement of Rule 17a-3(a)(17) does not apply to an account for which the customer or owner is not a natural person, such as the account of a corporation, partnership, limited liability company, or REIT. Similarly, where the account is owned by the trustees of the trust or a trust that is a legal entity separate from the holders of its beneficial interests (which may be natural persons) the account record requirement does not apply. However, the term "owner" in Rule 17a-3(a)(17) would generally apply to an UGMA/UTMA account, an IRA account and a 401k account where the beneficiary of the account is a natural person.

We remind broker-dealers, however, that paragraph (a)(17)(i)(D) of Rule 17a-3 provides that the account record requirement only applies to accounts for which the broker-dealer is, or has within the past 36 months been, required to make a suitability determination under the Federal securities laws or under the requirements of a self-regulatory organization of which the broker-dealer is a member. If the firm has not been, within the past 36 months, required to make a suitability determination for recommendations about securities made to the customer of an account under federal laws or the requirements of a self-regulatory organization of which it is a member, then the firm would not be required to make the records described in new paragraph 17a-3(a)(17).

As noted in the Adopting Release, application of new paragraph 17a-3(a)(17) does not limit any other Federal law or regulation or SRO rule that requires that a broker-dealer collect information regarding its customers.⁵

Question #3

New Rule 17a-3(a)(17) applies to an "account with a natural person as a customer or owner." Would the Commission consider a 401k account where the employer has established an omnibus account at the broker-dealer holding the assets of all its employees to be within the purview of this rule? How about a bank trust account where the bank has established an omnibus

¹ 17 CFR 240.17a-3.

² 17 CFR 240.17a-4.

³ See Exchange Act Release No. 44992 (October 26, 2001), 66 FR 55818 (Nov. 2, 2001) (the "Adopting Release").

⁴ Exchange Act § 3(a)(16) states, "the term 'State' means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States" (15 U.S.C. 78c(a)(16)).

⁵ See text accompanying note 43 in the Adopting Release. 66 FR 55818, at 55822 (Nov. 2, 2001).