UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC 20549

DIVISION OF
TRADING AND MARKETS

January 11, 2013

Mr. Ira Hammerman
Senior Managing Director and General Counsel, SIFMA
Office of General Counsel
1101 New York Avenue, NW, 8th Floor
Washington, DC 20005

Re: **Request for No-Action Relief Under Broker-Dealer Customer Identification Rule (31 C.F.R. § 1023.220)**

Dear Mr. Hammerman:

In your letter dated January 10, 2013, you request assurances that the staff of the Division of Trading and Markets will not recommend enforcement action to the Securities and Exchange Commission under Rule 17a-8 under the Securities Exchange Act of 1934 if a broker-dealer relies on a registered investment adviser to perform some or all of its customer identification program ("CIP") obligations, subject to certain enumerated conditions set forth in your incoming letter. Specifically, you request that the Division extend a no-action position that it took in 2011, which is substantially similar to previous no-action positions first taken by the Division in 2004.[1]

On February 12, 2004, the Division, in consultation with the Department of Treasury's Financial Crimes Enforcement Network ("FinCEN"), issued a letter stating that it would not recommend enforcement action to the Commission if a broker-dealer treated a registered investment adviser as if it were subject to an anti-money laundering program rule under 31 U.S.C. § 5318(h) ("AML Program Rule") for the purposes of

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[1] See Letter from Annette L. Nazareth, Director, Division of Market Regulation, Securities and Exchange Commission, to Alan Sorcher, Securities Industry Association, dated February 12, 2004 (the "2004 Letter"); Letter from Lourdes Gonzalez, Acting Co-Chief Counsel, Division of Trading and Markets, Securities and Exchange Commission, to Ryan Foster, Securities Industry and Financial Markets Association, dated January 11, 2011 (the "2011 Letter").

paragraph (b)(6) (now (a)(6)) of the CIP rule applicable to broker-dealers, 31 C.F.R. § 103.122 (now 31 C.F.R. § 1023.220) ("CIP Rule"). By its terms, the 2004 Letter was to be withdrawn without further notice on the earlier of: (1) the date upon which an AML Program Rule for investment advisers becomes effective, or (2) February 12, 2005. Because an AML Program Rule for investment advisers did not become effective, and in response to your subsequent requests for no-action relief, the no-action position in the 2004 Letter was extended for an additional 18 months on February 10, 2005, for an additional 18 months on July 11, 2006, for an additional two years on January 10, 2008, for an additional 12 months on January 11, 2010, and for an additional two years – subject to certain additional conditions – on January 11, 2011.

In your letter, you indicate that broker-dealers have come to rely on the no-action position that was taken in the Division's previous letters, and ask that the Division extend the position taken in the 2011 Letter.

Response

Without necessarily agreeing with your assertions, the Division, following further consultation with FinCEN staff, extends the no-action position in the 2011 Letter for an additional 2 years from the date of this letter.

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 were subject to an AML Program Rule for the purposes of paragraph (a)(6) of the CIP Rule provided that the other provisions of the CIP Rule are met, and: (1) the broker-dealer's reliance on the investment adviser is reasonable under the circumstances, as discussed in more detail below; (2) the investment adviser is a U.S. investment adviser registered with the Commission under the Investment Advisers Act of 1940; and (3) the investment adviser enters into a contract with the broker-dealer in which the investment adviser agrees that: (a) it has implemented its own anti-money laundering program consistent with the requirements of 31 U.S.C. 5318(h) and will update such anti-money laundering program as necessary to implement changes in applicable laws and guidance, (b) it (or its agent) will perform the specified requirements of the broker-dealer's CIP in a manner consistent with Section 326 of the PATRIOT Act, (c) it will promptly disclose to the broker-dealer potentially suspicious or unusual activity detected as part of the CIP being performed on the broker-dealer's behalf in order to enable the broker-dealer to file

a Suspicious Activity Report, as appropriate based on the broker-dealer's judgment,[2] (d) it will certify annually to the broker-dealer that the representations in the reliance agreement remain accurate and that it is in compliance with such representations, and (e) it will promptly provide its books and records relating to its performance of CIP to the Commission, to a self-regulatory organization that has jurisdiction over the broker-dealer, or to authorized law enforcement agencies, either directly or through the broker-dealer, at the request of (i) the broker-dealer, (ii) the Commission, (iii) a self-regulatory organization that has jurisdiction over the broker-dealer, or (iv) an authorized law enforcement agency.[3]

As to the reasonableness of a broker-dealer's reliance on an investment adviser, we understand that broker-dealers seeking to rely on the no-action position taken in this letter will undertake appropriate due diligence on the investment adviser that is commensurate with the broker-dealer's assessment of the money laundering risk presented by the investment adviser and the investment adviser's customer base. Such due diligence would be undertaken at the outset of the broker-dealer's relationship with the investment adviser, and updated during the course of the relationship, as appropriate.

Further, we expect that a broker-dealer's assessment of the money laundering risk presented by an investment adviser and the investment adviser's customer base would depend on the particular facts and circumstances. For example, in some instances, a broker-dealer may consider an affiliated investment adviser to present a lower money laundering risk than an unaffiliated investment adviser. The investment adviser's status as an affiliate, however, is one of many factors that may be relevant to such a risk assessment, and an affiliated investment adviser may or may not present a lower money laundering risk, depending on the facts and circumstances.[4]

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[2] Firms are reminded that nothing in this no-action letter relieves a broker-dealer of its obligation to establish policies, procedures, and controls that are reasonably designed to detect and report suspicious activity that is attempted or conducted by, at, or through the broker-dealer. See 31 C.F.R. § 1023.320(a)(2).

[3] A broker-dealer that chooses not to avail itself of the relief being granted pursuant to this letter may still contractually delegate the implementation and operation of its CIP to an investment adviser; however, the broker-dealer will remain solely responsible for assuring compliance with the CIP Rule and therefore, must actively monitor the operation of its CIP and assess its effectiveness. See "Customer Identification Programs for Broker-Dealers," Exchange Act Release No. 47752 (Apr. 29, 2003), 68 FR 25113, 25123 n. 132 (May 9, 2003).

[4] See, e.g., United States Senate, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, "U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History" (July 17, 2012), available at: http://www.hsgac.senate.gov/subcommittees/investigations/reports.

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,

Emily Westerberg Russell
Senior Special Counsel
Division of Trading and Markets

sifma
Invested in America

January 10, 2013

Via Email

Lourdes Gonzalez
Assistant Chief Counsel
Division of Trading and Markets
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: Request for No-Action Relief Under Broker-Dealer Customer Identification Rule (31 C.F.R. § 1023.220)

Dear Ms. Gonzalez:

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. § 1023.220 (formerly 31 C.F.R. §103.122)) issued pursuant to Section 326 of the USA PATRIOT Act.[2]

As you know, 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. The CIP Rule permits broker-dealers to rely on certain financial institutions to perform CIP procedures with respect to shared customers. Such reliance is permissible under the CIP regulations where: (1) it is reasonable under the circumstances; (2) the relied-upon financial institution is subject to an anti-money laundering program ("AML Program") rule ("AMLP Rule") under 31 U.S.C. § 5318(h) of the Bank Secrecy Act ("BSA")[3] and regulated by a Federal functional regulator; and (3) the relied-upon financial institution enters into a contract requiring it to certify annually to the broker-dealer that it has implemented an AML Program, and that it (or its agent) will perform specified requirements of the CIP.[4] The reliance provision is designed to permit two financial institutions with mutual customers to reach agreements between themselves as to how they will allocate performance of the requirements of

[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] 31 U.S.C. § 5311 *et seq.*

[4] 31 C.F.R. § 1023.220(a)(6) (formerly§ 103.122(b)(6)).

the CIP Rule and, thereby, rely on one another to avoid unnecessary duplication of efforts with respect to a given customer.

Although registered investment advisers ("RIAs") are regulated financial institutions and were subject to a proposed AMLP Rule,[5] because the AMLP Rule was not yet finalized at the time the CIP Rule went into effect, broker-dealers were not technically permitted to rely upon RIAs to perform any part of their CIP requirements. For that reason, SIFMA specifically sought and received assurances from the U.S. Securities and Exchange Commission ("SEC" or "Commission") staff on a number of occasions that the staff would not recommend enforcement action if a broker-dealer relied on an RIA under 31 C.F.R. § 1023.220(a)(6) (formerly 31 C.F.R. § 103.122(b)(6)) to perform some or all of the broker-dealer's CIP obligations with respect to shared customers.

SIFMA is writing again to seek assurances from the staff of the Division of Trading and Markets ("Division")[6] that it will not recommend enforcement action to the Commission if a broker-dealer, subject to the conditions set forth in the Division staff's No-Action Letter dated January 11, 2011,[7] (the 2011 No Action Letter") relies on an RIA pursuant to 31 C.F.R. § 1023.220(a)(6) (formerly 31 C.F.R.§ 103.122(b)(6)) to perform some or all of the broker-dealer's customer identification program obligations.

Previous No-Action Requests Have Been Granted

The requested relief was first issued by the staff of the Commission's Division of Trading and Markets, in consultation with the Department of Treasury's Financial Crimes Enforcement Network ("FinCEN"), in 2004 and has been renewed on a number of occasions since that time.[8] In each of its earlier No-Action Letters, staff of the Division stated 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") [9] if a broker-dealer relies on an RIA, prior to such adviser becoming subject to an AMLP Rule for the purposes of paragraph (a)(6) of the CIP Rule, provided that all of the other provisions of the CIP regulations were met: "(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."[10]

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[5] 68 Fed. Reg. 23646 (May 5, 2003).
[6] The Division was formerly known as the Division of Market Regulation.
[7] *See* Letter from Lourdes Gonzalez, Acting Co-Chief Counsel, Division of Trading and Markets, SEC, to Ryan D. Foster, SIFMA, dated January 11, 2011, *available at* http://www.sec.gov/divisions/marketreg/mr-noaction/2011/sifma011111.pdf (the "2011 No Action Letter").
[8] *See* Letter from Annette L. Nazareth, Director, Division of Market Regulation, SEC, to Alan Sorcher, SIA, dated February 12, 2004; Letter from Annette L. Nazareth, Director, Division of Market Regulation, SEC, to Alan Sorcher, SIA, dated February 10, 2005; Letter from Robert L.D. Colby, Acting Director, Division of Market Regulation, SEC, to Alan Sorcher, SIA, dated July 11, 2006; Letter from Erik Sirri, Director, Division of Trading and Markets, SEC, to Alan Sorcher, SIFMA, dated January 10, 2008; and Letter from Lourdes Gonzalez, Acting Co-Chief Counsel, Division of Trading and Markets, SEC, to Ryan D. Foster, SIFMA, dated January 11, 2011.
[9] 17 C.F.R. § 240.17a-8.
[10] *See, e.g.*, Letter from Daniel M. Gallagher, Jr., Deputy Director, Division of Trading and Markets, SEC, to Ryan Foster, SIFMA, dated January 11, 2010 (the "2010 Letter"). In interpretative guidance (in response to a question raised by

Shortly before the Division's 2008 No-Action Letter was set to expire, by letter dated January 7, 2010, SIFMA once again approached the Division with its request for renewal of the No-Action relief. However, by that time, the AMLP Rule that FinCEN had proposed in May 2003 had been withdrawn (effective November 4, 2008). Although FinCEN stated that it would not proceed with an AMLP requirement for investment advisers without publishing a new proposal, it also noted its view that, as it continues to consider the extent to which BSA requirements should be imposed on investment advisers, the activity of investment advisers is not entirely outside the current BSA regulatory regime.[11]

On January 11, 2010, the Division staff again issued a No-Action Letter stating that it would not recommend to the Commission that enforcement action be taken under Rule 17a-8 of the Exchange Act on these same conditions.[12] Because RIAs were no longer subject to a proposed AMLP Rule at the time of SIFMA's last request, and were not defined as a covered financial institution under an AMLP Rule, the Division's staff expressed their concerns about renewing the No-Action relief beyond January 10, 2011. Hence, although the Division again agreed to extend the prior No-Action relief, its January 11, 2010 response indicated -- in language not previously used in this context -- that "[t]he no-action position taken by this letter will be withdrawn without further action on January 10, 2011."

By letter dated January 11, 2011, SIFMA once again approached the Division to request an extension of the Division's No-Action relief granted in January 2010. On January 11, 2011, Division staff issued a No-Action Letter that extended its prior relief for an additional 2 years, subject to additional conditions.

Reliance on Registered Investment Advisers

As we have previously indicated in our prior No-Action relief requests to the Division staff, SIFMA broker-dealer members have come to rely on RIAs under the CIP Rule to perform some or all of the CIP obligations related to customers with whom both have a customer relationship. 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. RIAs are regulated by a Federal functional regulator and many have established AMLPs consistent with 31 U.S.C. 5318(h). Permitting two regulated financial institutions with a common customer to rely on one another to perform some or all of the CIP requirements avoids duplication of efforts and inefficient allocation of significant and costly resources.

SIFMA also believes that the interaction between broker-dealers and RIAs is precisely the type of relationship intended to be covered by the reliance provisions, and should continue to be available to firms in a position to implement such reliance. RIAs often have the most direct relationship with the customers they introduce to broker-dealers, are best able to obtain the necessary documentation and information from and about the customers, and therefore are in the best position to perform some

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SIFMA), FinCEN and the Federal banking regulators clarified that the program employed by the relied-upon financial institution does not need to duplicate the procedures of the Bank's CIP and that the reliance provision permits the Bank to rely on another financial institution to perform any of the elements that the CIP rule requires to be in the Bank's CIP. See Interagency Interpretative Guidance on Customer Identification Program Requirements under Section 326 of the USA PATRIOT Act (April 28, 2005) at page 13.

[11] 73 Fed. Reg. 65568-69 (Nov. 4, 2008).

[12] *See* 2010 Letter, supra note 10.

or all of the requirements of the CIP Rule. Moreover, RIAs are often reluctant to have the broker-dealer contact the customer because they view the other institution as their competitor. Accordingly, SIFMA member firms would like to continue to rely on RIAs under the CIP Rule to perform some or all of the CIP obligations with respect to customers with whom both have a customer relationship.

As stated in our January 11, 2011 no-action request, under our proposal a broker-dealer may treat an RIA as if it were subject to an AMLP Rule for the purposes of paragraph (a)(6) of the CIP Rule (31 C.F.R. § 1023.220) where, provided that the other provisions of the CIP Rule are met: (1) the broker-dealer's reliance on the RIA is reasonable under the circumstances; (2) the RIA is a U.S. investment adviser registered with the Commission under the Investment Advisers Act of 1940; and (3) the RIA enters into a contract with the broker-dealer in which the RIA agrees that: (a) it has implemented its own AML Program consistent with the requirements of 31 U.S.C. 5318(h) and will update such AML Program as necessary to implement changes in applicable laws and guidance, (b) it (or its agent) will perform the specified requirements of the broker-dealer's CIP in a manner consistent with Section 326 of the PATRIOT Act, (c) it will promptly disclose to the broker-dealer potentially suspicious or unusual activity detected as part of the CIP being performed on the broker-dealer's behalf in order to enable the broker-dealer to file a Suspicious Activity Report, as appropriate based on the broker-dealer's judgment, (d) it will certify annually to the broker-dealer that the representations in the reliance agreement remain accurate and that it is in compliance with such representations, and (e) it will promptly provide its books and records relating to its performance of CIP to the Commission, to a self-regulatory organization ("SRO") that has jurisdiction over the broker-dealer, or to authorized law enforcement agencies, either directly or through the broker-dealer, at the request of (i) the broker-dealer, (ii) the Commission, (iii) an SRO that has jurisdiction over the broker-dealer, or (iv) an authorized law enforcement agency.

As further stated in the SIFMA letter, to confirm that the broker-dealer's reliance on the RIA is reasonable under the circumstances, the broker-dealer would undertake appropriate due diligence on the RIA that is commensurate with the broker-dealer's assessment of the AML risk presented by the RIA and the RIA's customer base. For example, an affiliate might be considered lower risk than a less known RIA. Such due diligence would be undertaken at the outset of the broker-dealer's relationship with the investment adviser, and updated during the course of the relationship, as appropriate. Consistent with the broker-dealer's assessment of the risk and the nature of the relationship, examples of appropriate due diligence, either at the outset or during the relationship, might include obtaining a copy of (or a summary of) the RIA's CIP processes or procedures, obtaining a completed questionnaire from the investment adviser regarding its CIP program, or obtaining attestations from the RIA relating to the adviser's performance of CIP. Such attestations could include, by way of example, that an affiliate is in compliance with the parent company's global CIP.

Request for No-Action Relief

SIFMA respectfully requests that the Division staff issue No-Action relief that allows broker-dealers to continue to rely on RIAs to perform CIP with respect to common customers based on the conditions included in the Division staff's No-Action Letter dated January 11, 2011.[13] We note that

[13] *See* Letter from Lourdes Gonzalez, Acting Co-Chief Counsel, Division of Trading and Markets, Securities and Exchange Commission, to Ryan D. Foster, SIFMA, dated January 11, 2011, *available at* http://www.sec.gov/divisions/marketreg/mr-noaction/2011/sifma011111.pdf.

FinCEN has publicly stated that it is developing a notice of proposed rulemaking that would require investment advisors to establish AML programs.[14]

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We thank you for the opportunity to submit this No-Action request. We would be happy to discuss with you our request for No-Action relief. Please do not hesitate to contact me if you would like to discuss these matters further.

Respectfully submitted,

Ira Hammerman
Senior Managing Director and
General Counsel

cc: Jennifer Shasky Calvery, Director, FinCEN
Jamal L. El-Hindi, Associate Director, FinCEN
John Fahey, U.S. Securities and Exchange Commission

[14] *See* Unified Agenda of Federal Regulatory and Deregulatory Actions, 77 Fed. Reg. 7663, 7818 (Feb. 13, 2012). The current Unified Agenda also is available at: http://www.reginfo.gov/public/do/eAgendaMain. *See also Remarks of James H. Freis, Jr., Director, FinCen at American Bankers Assoc./American Bar Assoc. Money Laundering Enforcement Conference* (Nov. 15, 2011), *available at* http://www.fincen.gov/news_room/speech/pdf/20111115.pdf.