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# *No-Action Letters Allow Third Parties to Retain and Preserve Records for Broker-Dealers and Investment Advisers*

FROM THE INVESTMENT MANAGEMENT PRACTICE

## Introduction

The Staff of the Securities and Exchange Commission ("SEC") recently issued two no-action letters effectively allowing investment managers to outsource their trade confirmation recordkeeping obligations under federal securities laws.[1] The relief should allow managers and advisers to employ market solutions to help them satisfy certain of their recordkeeping obligations.

## Recordkeeping Relief for Broker-Dealers

Generally, Rule 10b-10 of the Securities Exchange Act of 1934 ("Exchange Act") requires broker-dealers to deliver confirmations to their customers at or before completion of each securities transaction; Exchange Act Rule 17a-3(a)(8) requires broker-dealers to make and keep current copies of confirmations of all purchases and sales of securities; and Exchange Act Rule 17a-4(b)(1) requires broker-dealers to preserve all records required under Exchange Act Rule 17a-3(a)(8) for a period of not less than three years – the first two years in an easily accessible place.

In the March Letter, the SEC's Division of Trading and Markets stated that it would not recommend enforcement action under Exchange Act Rules 17a-3(a)(8) and 17a-4 against broker-dealers ("Broker-Dealer Participants") who engage a third party records retention outsourcing firm ("Outsourcing Firm") to transmit confirmations of purchases and sales of securities if these Broker-Dealer Participants also rely on the Outsourcing Firm to maintain and preserve such confirmations under Exchange Act Rule 17a-4(i).

Under the March Letter, Broker-Dealer Participants must continue to retain the required Exchange Act Rule 10b-10 information for each confirmation as required under such Rule, but they no longer need to retain the confirmation itself. Additionally, each Broker-Dealer Participant is still required by Form BD to promptly notify regulators of any third party books and records maintenance arrangements. The Outsourcing Firm must also make copies of all confirmations available to the SEC's examination staff in a prompt manner.

## Recordkeeping Relief for Investment Advisers

Rule 204-2 of the Investment Advisers Act of 1940 ("Advisers Act") requires advisers to make and keep records of all written communications relating to the execution of any purchase or sale of

securities (including trade confirmations) and permits advisers to preserve records electronically, provided that certain requirements are met.

In the August Letter, the SEC's Division of Investment Management stated that it would not recommend enforcement action against advisers that engage the Outsourcing Firm to maintain and preserve confirmations in satisfaction of Advisers Act Rules 204-2(a)(7), 204-2(b)(3), and 204-2(g).

## Conclusion

The SEC's recently issued no-action relief means investment managers no longer have to create their own electronic storage capacity or physically store trade confirmation records. Broker-dealers and investment advisers may now rely on third parties to bear the administrative and regulatory burdens associated with trade confirmation archiving.

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*If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:*

**Chair**

Michael R. Rosella
212-318-6800
mikerosella@paulhastings.com

**Vice Chair**

David A. Hearth
415-856-7007
davidhearth@paulhastings.com

Wendell M. Faria
202-551-1758
wendellfaria@paulhastings.com

Jacqueline A. May
212-318-6282
jacquelinemay@paulhastings.com

Mitchell E. Nichter
415-856-7009
mitchellnichter@paulhastings.com

Rey Pascual
404-815-2227
reypascual@paulhastings.com

Domenick Pugliese
212-318-6295
domenickpugliese@paulhastings.com

Gary D. Rawitz
212-318-6877
garyrawitz@paulhastings.com

Arthur L. Zwickel
213-683-6161
artzwickel@paulhastings.com

[1] *See* Omgeo LLC, SEC No-Action Letter (March 23, 2009) (hereinafter, the "March Letter"); Omgeo LLC, SEC No-Action Letter (August 14, 2009) (hereinafter, the "August Letter").