

THE FINANCIAL SERVICES ROUNDTABLE

*Financing America's Economy*



*Invested in America*

May 2, 2012

**VIA Electronic Delivery**

Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

David A. Stawick  
Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, NW  
Washington, DC 20581

***Re: Identity Theft Red Flags Rules, [Release No. IC-29969; File No. S7-02-12]***

Dear Ms. Murphy and Mr. Stawick:

The Financial Services Roundtable (“Roundtable”)<sup>1</sup> and the Securities Industry and Financial Markets Association (“SIFMA”)<sup>2</sup> respectfully submit our comments to the Commodity Futures Trading Commission (“CFTC”) and the Securities and Exchange Commission (“SEC”)

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<sup>1</sup> The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America’s economic engine, accounting directly for \$92.7 trillion in managed assets, \$1.2 trillion in revenue, and 2.3 million jobs. More information about the Roundtable is available at <http://www.fsround.org>.

<sup>2</sup> SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA’s mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (“GFMA”). More information about SIFMA is available at <http://www.sifma.org>.

(jointly, the “Agencies”) on their proposed Identity Theft Red Flags Rules and guidance (collectively, the “Red Flags Rules” or “Rules”) published for comment on February 28, 2012 (the “Proposing Release”).<sup>3</sup> Our respective members recognize the serious implications of data security risks and have taken active steps individually and in collaboration with others, including through participation in BITS<sup>4</sup> and the Identity Theft Assistance Center,<sup>5</sup> to address these risks.

Financial institutions have a strong history of seeking to protect customer information, deploying broadly-accepted authentication methods, applying security controls to detect and prevent fraudulent activities, and educating customers on how to protect their information and prevent identity theft. Customer trust in the security and continuity of financial transactions is vital to the stability of the industry and the strength of the nation’s economy. Our members work diligently to maintain that trust as they continually improve their technologies, processes, and procedures to protect customers’ information. In recognition of the importance of this issue for the Roundtable, SIFMA, our respective members, and their clients, we appreciate this opportunity to comment on the proposed Red Flags Rules.

### **Executive Summary**

Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”)<sup>6</sup> amended the Fair Credit Reporting Act of 1970 (“FCRA”)<sup>7</sup> by adding the SEC and the CFTC to the list of federal agencies required to prescribe and enforce rules that require “financial institutions” and “creditors” under their respective jurisdiction that offer or maintain “covered accounts” to develop and implement a written identity theft program designed to detect, prevent, and mitigate identity theft. The proposed Rules are substantially similar to rules adopted in 2007 by the Federal Trade Commission and other federal financial regulatory agencies.<sup>8</sup>

Our comments on the proposed Rules are summarized as follows:

- The SEC should address uncertainty concerning the scope of proposed Rule 201 of Regulation S-ID,<sup>9</sup> and the extent to which particular financial entities will be subject to the Rule if they are deemed “financial institutions” or “creditors” under the FCRA. At a minimum, entities that are unlikely to qualify as financial

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<sup>3</sup> See Release No. IC-29969, 77 Fed. Reg. 13450 (Mar. 6, 2012).

<sup>4</sup> As a division of the Roundtable, BITS leverages intellectual capital to address issues at the intersection of financial services, operations, and technology. BITS focuses on strategic issues where industry cooperation serves the public good, such as fraud prevention, critical infrastructure protection, and the safety of financial services.

<sup>5</sup> The Identity Theft Assistance Center (“ITAC”), an affiliate of the Roundtable, fights identity theft by helping victims to recover from this serious crime, cooperating with law enforcement to catch and convict criminals, and conducting research on the causes of and solutions to identity theft. ITAC provides its victim assistance service at no cost to customers of member companies.

<sup>6</sup> Public Law 111-203, 124 Stat. 1376 (2010).

<sup>7</sup> Public Law 91-508, 84 Stat. 1114 (1970).

<sup>8</sup> See 15 U.S.C. §1681(e)(1) (the “2007 Rules”).

<sup>9</sup> See proposed §248.201(a).

institutions or creditors under the FCRA, such as nationally recognized statistical rating organizations (“NRSROs”), self-regulatory organizations (“SROs”), municipal advisors, municipal securities dealers, and registered investment advisers, should be expressly excluded from Regulation S-ID’s coverage.

- The Agencies should expressly identify the types of accounts that may pose a reasonably foreseeable risk of identity theft, and thus would be subject to the Red Flags Rules. Furthermore, accounts such as insurance company separate accounts (“Separate Accounts”) that are registered as investment companies under the Investment Company Act of 1940 (the “1940 Act”), should be specifically excluded from the definition of “covered account” where the risk of identity theft is very low and there is no benefit to investors to offset the initial and ongoing compliance costs of covered financial institutions.
- The cost estimates reflected in the Proposing Release appear to our members to be significantly underestimated, particularly for large, complex financial institutions that would be required to build systems across multiple business lines.

### **Scope of the Rules**

The Agencies define the financial institutions and creditors proposed to be subject to the Rules.<sup>10</sup> In each case, the types of entities under the respective jurisdiction of the CFTC and SEC that would be deemed “financial institutions” are listed; however, the scope sections of both Agencies’ Rules provide that the financial institutions and creditors subject to the respective Rules are also subject to the FCRA. We respectfully submit that this construct is circular and creates uncertainty for financial institutions seeking to determine the application of the Rules.

Some guidance was included in the Proposing Release stating that, for example, the SEC does not anticipate that the scope of its Rules will cover nationally recognized statistical rating organizations (“NRSROs”), self-regulatory organizations (“SROs”), municipal advisors, municipal securities dealers, or most registered investment advisers. Rule 201(a), however, specifically lists investment advisers registered or required to be registered with the SEC as one type of financial institution covered by the Red Flags Rules. The Roundtable and SIFMA respectfully request that the Agencies provide greater clarity and certainty regarding the scope of the Rules. Specifically, we ask that the SEC exclude from the definition of “financial institution” those entities that are unlikely to be deemed financial institutions or creditors under the FCRA, such as NRSROs, SROs, municipal advisors, municipal securities dealers, and registered investment advisers. A specific exclusion would help to eliminate uncertainty over the scope and application of the proposed Rules.

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<sup>10</sup> See proposed §162.30(a) and proposed §248.201(a).

### **Definition of Covered Account and Other Terms**

Financial institutions and creditors will be required to comply with the proposed Rules only if they offer or maintain “covered accounts.” The Agencies propose to define an “account” as “a continuing relationship established by a person with a financial institution or creditor to obtain a product or service for personal, family, household or business purposes.”<sup>11</sup> Under the proposed Rules, covered accounts include: (a) accounts offered or maintained primarily for personal, family, or household purposes, that involve or are designed to permit multiple payments or transactions; and (b) other accounts for which there is a foreseeable risk to customers or to the safety and soundness of the financial institution or creditor from identity theft, including financial, operational, compliance, reputation, or litigation risks.<sup>12</sup> The CFTC’s proposed definition provides a margin account as an example of a covered account. The SEC’s proposed definition includes a brokerage account and an account maintained by a mutual fund that permits wire transfers or other payments to third parties as examples of covered accounts. As proposed, financial institutions and creditors must periodically reevaluate whether they offer or maintain covered accounts.

The Roundtable, SIFMA, and our respective members believe that the Agencies should specifically define the types of accounts that would qualify as covered accounts. Similarly, we believe that the Agencies should specify the types of accounts that pose a reasonably foreseeable risk of identity theft, and thus would be subject to the Rules. Providing these details will further help to eliminate uncertainty over the scope and application of the proposed Rules.

Our members believe that accounts for which the risk of identity theft is minimal or nil should specifically be excluded from the Rule’s definition of “covered account.” One such type of account is the insurance company separate account, which is an “investment company” registered under the 1940 Act and established under state insurance law. Separate Accounts are vehicles underlying insurance company variable life and annuity insurance products. The assets of Separate Accounts are owned by the insurance company and customer records are made and maintained by the relevant insurance company. Thus, Separate Accounts are established by and for insurance companies under state law and the 1940 Act and are not established for personal, family, or household purposes. Further, third parties, including customers, do not have direct access to Separate Accounts, which means that the types of identity theft risks anticipated by the proposed Red Flags Rules are essentially nonexistent. Absent clear exclusionary language under the Red Flags Rules, however, insurance companies that utilize Separate Accounts will be subject, *in futuro*, to periodic reexamination of the impact of the Red Flags Rules on Separate Accounts notwithstanding the absence of any corresponding benefit to consumers. Accordingly, the Roundtable and SIFMA respectfully request that the agencies expressly exclude Separate Accounts from the definition of “covered account” under the Rules.

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<sup>11</sup> See proposed §162.30(b)(1) and proposed §248.201(b)(1).

<sup>12</sup> See proposed §162.30(b)(3) and proposed §248.201(b)(3).

### **Costs of Compliance**

The Agencies generally note that the proposed Rules should not impose “significant new costs or benefits” because the Rules do not create any requirements not already included in the 2007 Rules.<sup>13</sup> Accordingly, the Agencies have estimated the compliance burdens based on their understanding that the financial entities subject to their respective jurisdictions are already subject to substantially similar requirements under the 2007 Rules, the Gramm-Leach Bliley Act Security Standards<sup>14</sup> and the USA PATRIOT Act’s Customer Identification Program.<sup>15</sup>

Despite the Agencies’ assertions, the consensus of our members is that the estimated compliance costs for the proposed Rules are extremely low and unrealistic.<sup>16</sup> Indeed, several of our members have expressed concern that the actual time expenditure and related costs of complying with the Rules would be exponentially greater than the Agencies’ estimates.

Our members estimate that the initial compliance burden to implement the Rules would average 2,000 hours for each line of business conducted by a large, complex financial institution (this estimate would vary based on the number of “covered accounts” for each line of business). Large and complex financial institutions may have identity theft processes and programs established across multiple lines of business, which means that the aggregate compliance burden would be much more extensive than currently estimated.

Thus, a large, complex financial institution that holds covered accounts for three lines of business (*e.g.*, futures, securities brokerage, and mutual funds) could average 6,000 hours for initial implementation. In addition, the continuing compliance monitoring for a large, complex financial institution, including risk assessments, periodic review and reporting, and training, among other tasks, would average 400 hours annually. We anticipate that financial institutions with an existing Red Flags program would experience an incremental burden due to reassessing the scope of “covered accounts” and reevaluating whether a business activity would be defined as a “financial institution” or a “creditor” for purposes of the Agencies’ Rules.

The Agencies’ estimated compliance costs further fail to consider the cost to third-party service providers, many of which may be required to implement an identity theft program even though they are not financial institutions or creditors.

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<sup>13</sup> See Proposing Release at pgs. 13463 and 13466.

<sup>14</sup> 15 U.S.C. 6801.

<sup>15</sup> 31 U.S.C. 5318(l).

<sup>16</sup> The Agencies estimated an initial compliance burden of 31 hours and a continuing compliance burden of 8 hours. See Proposing Release at pgs. 13463 nn. 127-128 and 13465 nn. 134-135.

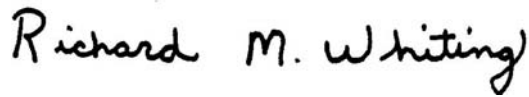
**Conclusion**

The Roundtable, SIFMA, and our respective members support the Agencies' efforts to protect clients from identity theft through the proposed Red Flags Rules. As discussed above, however, we urge the Agencies to modify several key definitions to provide greater clarity and certainty concerning the Rule's intended scope and application, and to reflect more realistic estimates of the costs of the proposed Rules in the rulemaking.

\* \* \*

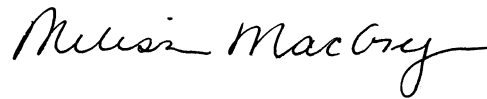
The Roundtable, SIFMA, and our respective members appreciate the opportunity to submit comments on the proposed Identity Theft Red Flags Rules and guidance. If it would be helpful to discuss our specific comments or general views on this issue, please contact Richard Whiting at [Rich@fsround.org](mailto:Rich@fsround.org) or Richard Foster at [Richard.Foster@fsround.org](mailto:Richard.Foster@fsround.org) at the Roundtable, or Melissa MacGregor at [mmacgregor@sifma.org](mailto:mmacgregor@sifma.org) at SIFMA.

Sincerely yours,



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*With a copy to:*

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The Honorable Bart Chilton  
The Honorable Scott D. O'Malia  
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